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IN THE

Supreme Court of the United States

October Term, 1955

No. .....

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; HOME INVESTMENT COMPANY, as representatives of a class of homeowners; TITLE SERVICE COMPANY, as trustee on homeowners' trust deeds; ROBERT H. WALLIS; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BELLFLOWER; and JOHN D. WILLHOIT,

Petitioners,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER and WILLIAM K. DIVERS, as members of the Home Loan Bank Board; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners[1] pray that writs of certiorari issue to review the orders and judgments hereafter described, entitled:

No. 14,378

In the United States Court of Appeals for the Ninth Circuit

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER AND WILLIAM K. DIVERS, AS MEMBERS OF THE HOME LOAN BANK BOARD; A. V. AMMANN; GEORGE K. BRAMLEY; AND THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, A FEDERAL CORPORATION,

Petitioners,

vs.

HONORABLE PEIRSON M. HALL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA; THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA; MALLONEE, *et al.*,

Respondents,

and respectfully represent as follows:

[1]Petitioners are the real parties in interest, except said Honorable Judge and Court, who are represented by separate counsel.

Opinions Below.

The opinion of the Court of Appeals in these original mandamus and injunction proceedings before it, will be found in 225 F. 2d Adv. 349, and filed herewith in slip opinion form as Appendix B.

The opinions of the United States District Court, against which said mandamus, etc., were issued, will be found in 117 Fed. Supp. 259 and 122 Fed. Supp. 401, and also at 960.[2] References herein to such opinions are to the Appendices A and B and I and II filed herewith.

Jurisdiction.

Jurisdiction of the Supreme Court is invoked upon the grounds that the Court of Appeals has:

(a) repealed laws Congress enacted, enforced laws Congress repealed, and enacted laws Congress refused to pass;

(b) enforced as *res judicata* of the merits decisions based wholly on absence of jurisdiction; and

(c) enforced as *res judicata* matters discussed in prior opinions, but never made a part of any prior judgment or mandate.

The orders, judgments and original writs of mandamus and injunction of the Court of Appeals were entered July 18, 1955. Timely rehearing petitions were denied October 12, 1955.

Petitioners believe the statutory provisions conferring Supreme Court jurisdiction to review by certiorari, are 28 U. S. C., §§1254 and 2101.

Questions Presented.

12,000,000 savings depositors and homeowners are the mutual owners of 1,640 Federal Savings and Loan Associations which are members of Federal Home Loan Banks throughout the Nation. Debts of the Associations to the Banks exceed $867,478,000. The charters of all said Associations and Banks, as well as the notes evi-

[2]See appendix and record reference at end hereof.

dencing the debts, each contain express reservations for Congressional amendments of applicable statutes:

1. Can the Court of Appeals nullify such power of Congress by holding remedial amendments of statutes are "purely prospective" and do not apply to existing Banks, Associations, or their debts?

2. Can original writs of mandamus and injunction be substituted by the Court of Appeals for untried actions and unheard appeals, and thereby preclude 30,000 Federal savings depositors and 8,000 homeowners from defending *on the merits* against secret foreclosure of $7,000,000 of their savings and homes?

3. Can 1952-53 opinions of the Court of Appeals, dismissing pleadings without trial for "lack of jurisdiction," now be held *"res judicata"* of the untried merits, and thereby invalidate subsequent amendments by Congress in 1954 expressly conferring jurisdiction on the United States District Courts to decide the yet pending and untried issues?

Statutes Involved.

(a) Power of Congress to confer jurisdiction on United States Courts. United States Constitution, Article I, §8, clauses 9 and 18:

> "The Congress shall have power
>
> "[cl. 9] To constitute Tribunals inferior to the supreme court;
>
> "[cl. 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . ."

(b) The Housing Act of 1954, 68 Stat. 590, Sections 501, 502, 503, and 818, conferring jurisdiction on United States Courts over the Federal Savings System by repealing and amending parts of:

(1) The Federal Savings and Loan Association creative sections of the Home Owners' Loan Act of 1933, 48 Stat. 128, Title 12, U. S. C., §1461, *et seq.;*

(2) The Federal Savings and Loan Insurance Corporation creative sections of the National Housing Act, 48 Stat. 1246, Title 12, U. S. C., §1724, *et seq.;*

(3) The advances to members creative sections of the Federal Home Loan Bank Act, 47 Stat. 725, Title 12, U. S. C., §1421, *et seq.*

The "provisions involved are lengthy." Therefore their pertinent text is set forth at pages 9 to 34 of Appendix A herewith.

Statement.

1. 38,000 Savings Depositors and Homeowners Are Threatened With Secret Foreclosure.

30,000 Federal Savings Association depositors are immediately threatened by respondents with secret foreclosure, prior to trial and without redemption, of $7,000,000 of their deposited savings.[3]

8,000 Federal Savings Association homeowner borrowers are also threatened with foreclosure of $7,000,000 of claimed liens upon deeds of trust upon their respective homes.

2. Secret Foreclosure Threatened, Despite Tender of Payment in Full.

Petitioner Federal Savings Association has twice tendered full payment of the $7,000,000 denied debt which respondents yet threaten to secretly foreclose. Such tenders were made by cashiers' check and cash, to be de-

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[3]At oral hearing of a stay application before Mr. Justice Douglas, respondents, in 1955, for the first time gave assurances that secret foreclosure of petitioners' savings would be temporarily postponed. However such postponement is *only* pending Supreme Court review. Respondents have repeatedly refused to give any assurances to the trial Court that they would postpone secret foreclosure of petitioners' savings until court trial of respondents' own foreclosure action 13979. Respondents, as plaintiffs in this action, asked the Court to decide the amount, *if any* due, to declare the extent and enforceability of respondents' claimed lien, and *thereafter* to judicially foreclose.

posited in Court, pending court adjudication of the amount, if any, due on the denied $7,000,000 debt.

The first tender of over $6,300,000 was made in 1948 in an action filed by petitioners.[4] The second tender of over $7,000,000 was made in respondents' own Court foreclosure action,[5] filed by one of them as plaintiff, asking Court decision of the amount due on, and Court foreclosure of, said denied debt.

Both tenders were rejected. Rejection of such tenders stopped accrual of further interest, discharged all security, and precluded forclosure.[6]

3. Terms of Denied Debt Permit Secret Foreclosure.

The denied debt is evidenced by 4 separate Conservator's notes. Each of the 4 alleged notes purport to authorize respondents to secretly foreclose petitioners' savings, without notice, at an unknown time, and place of sale, and without any right of redemption. Thereby respondents would be the only bidders at their own secret foreclosure sale, from which they had excluded petitioners and all independent bidders. The purported notes read in part:

> ". . . payee may, . . . sell . . . the whole . . . collateral security, without any relief to the maker from any valuation or appraisement laws . . . at any public or private sale, without demand, advertisement or notice of the time or place of sale or of adjournments thereof, all of which are hereby expressly waived. The maker further waives any and all equity or right of redemption, whether before or after sale hereunder, and agrees that upon such sale the payee may become the purchaser . . .

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[4]See footnote 9 for resume of action 5421.

[5]See footnote 10 for résumé of action 13979.

[6]*Calif. Civil Code*, §1504; *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415 (1918); *Walker v. Houston*, 215 Cal. 742, 12 P. 2d 952 (1932).

free from any such right or equity of redemption. . . ."[7]

4. Petitioners Have Meritorious, Untried Defenses to Respondents' Threatened Foreclosure.

Petitioners have answered and cross-complained, defending against said foreclosure.[8]

Petitioners did not execute, nor did they receive the consideration for, the 4 alleged notes, naming San Francisco Bank as payee, and which aggregate $6,300,000 face, (alleged accrued interest exceeds $700,000; the combined total is over $7,000,000). Respondents are fully secured by U. S. Bonds and cash. (See Appx. A, p. 91.)

Petitioners untried and undecided defenses include:

(a) Absence and/or failure of consideration;

(b) Violation by respondents of applicable statutes and regulations in creation by respondent Conservator Ammann, in favor of respondent San Francisco Bank, of the denied $7,000,000 debt, alleged to be a liability of petitioner;

(c) Tenders made by petitioners and rejected by respondents, which discharged all liens and preclude foreclosure; and

(d) Expiration of statutes of limitation.

5. Petitioners Have for 9 Years Sought, and Respondents Have Resisted Court Adjudication of the Amount, and Validity, of the Denied Debt.

The $7,000,000 denied debt was purportedly created in 1946-47 by respondent Ammann (as purported Federal Conservator for petitioner Federal Savings Association). He executed 4 Conservator's notes in favor of respondent San Francisco Bank as payee. He also purported to assign and pledge $14,000,000 of petitioners' U. S.

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[7]See appendix I, pgs. 133 to 136 for text of notes.

[8]See footnote 10 for résumé of respondents foreclosure action.

bearer bonds and homeowners' notes and trust deeds, as alleged security for said 4 Conservator's notes.

Petitioners have constantly, since 1946, denied the validity and enforceability of said $7,000,000 alleged debt. No Court trial has yet been held.[9]

After continuously denying the jurisdiction of the Federal Courts to decide such issues, respondents have herein reversed themselves and persuaded the Court of Appeals in this case to decide such issues before, and without, any decision by any trial Court, Federal or State.[10]

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[9]Action 5421 was filed in 1946 in the U. S. District Court, Southern District of California, by petitioners Mallonee, *et al.*, as the Shareholders' Protective Committee, on behalf of the then 16,000 savings depositors of petitioner Federal Savings Association. Such action sought, among other things, return of $26,000,000 of petitioners' seized savings, consisting of U. S. bearer bonds, uncounted cash and negotiable securities, seized by respondent Ammann. Ammann had been appointed Conservator for petitioner Federal Savings Association without notice or hearing, and Petitioners allege maliciously and without cause. Respondent Ammann had refused to give any receipt for, or to permit any independent counting or audit of petitioners' $26,000,000 of uncounted cash and securities.

The action also sought to prevent creation of the denied $7,000,000 debt. When said debt was created in defiance of a restraining order of the U. S. Court in said action, pleadings were amended to seek cancellation of said debt as fraudulent, and declaratory relief as to the existence of said debt.

Petitioners claimed the seizures were unconstitutional. In *Mallonee v. Fahey,* 68 F. Supp. 418, a three-judge court agreed. In 1947, the Supreme Court in *Fahey v. Mallonee,* 332 U. S. 245 reversed and held the Acts of Congress constitutional. But, in *Ex parte Fahey,* 332 U. S. 258, refused prohibition, mandamus, and injunction, then sought by respondents to prevent trial in the U. S. District Court.

In 1948, after the Supreme Court decisions, respondents removed the Conservator and restored petitioner Association, and part, *but not all,* of its seized assets to its founding management from whom it had been seized. By administrative order No. 388, respondents ordered the removed Conservator to account with the District Court. The first accounting was rejected by the Court; the second attempt to account is pending, subject to petitioners' multi-million dollar objections as yet untried by the Court.

[10]Respondents have objected to the jurisdiction of the U. S. Courts in *every* action, including their own foreclosure action

In 1948, when petitioners first tender of $6,300,000 was rejected by respondents, the U. S. District Court ordered respondents to deposit in Court, pending trial, the 4 conservator's notes and all alleged security. Said security was $5,300,000 face of U. S. bearer bonds and $8,500,000 face of homeowners' notes and trust deeds. Such $8,500,000 was the aggregate face of 4,236 separate notes and 3,944 separate trust deeds of petitioners' 8,000 homeowner borrowers.

Respondents complied with said order, deposited said notes and security in Court, and never appealed therefrom.

6. Savings Depositors' and Homeowners' Meritorious Defenses Against Secret Foreclosure Have Never Been Heard or Decided by Any Court.

Appeals taken by respondents from other orders in 1949, had resulted in 1952-53 opinions of the Court of Appeals, ordering dismissal "for lack of jurisdiction" of various of petitioners' pleadings and actions.[11]

Such dismissals were without trial or decision of the amount, or the validity, of said denied $7,000,000 debt.

The mandate of the Court of Appeals to the District Court in 1953, required:

(a) The return from the Clerk of said District Court to respondents San Francisco Bank of the 4 Conservator's notes and petitioners' $7,000,000 of U. S. Government bearer bonds and cash, the alleged security for said notes.

13979, filed by them as plaintiffs in 1952, 6 years after petitioners, in 1946, commenced action 5421. Action 13979 was filed in California State Courts and removed to U. S. District Court. It sought declaratory relief, adjudicating the amount, if any, due, and the validity of the lien respondents claimed on said $7,000,000 denied debt. Action 13979 has never been before the Supreme Court nor the Court of Appeals on any previous appeals or certiorari. Their present original proceedings in the Court of Appeals for writs of mandamus and injunction were filed by respondents to compel dismissal or remand of all pending actions, and to enjoin petitioners' defenses against secret foreclosure.

[11] *Home Loan Bank Board v. Mallonee*, 196 F. 2d 336; *Fahey v. O'Melveny & Myers*, 200 F. 2d 420; *Fahey v. Calverley*, 208 F. 2d 197.

(b) Dismissal of various pleadings, *but not* the action 5421.

The appeals upon which said mandate had been issued, were from actions 5421 and 5678 only. Respondents' own foreclosure action 13979 (commenced by them as plaintiffs 6 years after actions 5421-5678) had never been consolidated therewith, nor had it then been appealed. *It has never been the subject of any previous Supreme Court decision or certiorari.*

Respondents insisted before the U. S. District Court that such dismissals "for lack of jurisdiction" decided the *merits,* not only of the pleadings so dismissed, but also of respondents' own separate untried foreclosure action 13979.

In disposing of this contention the U. S. District Court found (Appx. I, p. 90, 122 F. Supp. 401, 444):

> ". . . it would be repugnant to all ideas of justice and law, that the appellate court intended by mandate in one case, (5421-5678), to summarily decide the merits of another case, (13979), not before them on appeal, and no phase of which had been decided by the trial court so as to posture it for appeal, and thus to preclude any defense by Long Beach Association to action 13979. It is also repugnant to the express terms of the order of that court, which . . . expressly permitted the San Francisco Bank to prosecute, and the Long Beach Association to appear in, answer, defend and participate in action 13979 . . ."

Such finding remains unreversed and unmodified by the Court of Appeals.

7. United States District Court Prevents Secret Foreclosure Without Redemption, and Quiets Homeowners' Titles.

Upon receipt by the U. S. District Court of the 1953 mandate of the Court of Appeals, petitioners made their

second $7,000,000 tender, by cash and cashiers' check, in respondents' own foreclosure action 13979. Upon rejection of this second tender by respondents, the District Court sought assurances from respondents that no secret foreclosure would be held pending Court trial of respondents' own foreclosure action. Respondents refused.

This is in striking contrast to the assurances to Mr. Justice Douglas that no secret foreclosure would be held pending disposition of this matter by this Court.[12]

After such refusal the U. S. District Court made its order in action 13979 directing the Clerk to retain in Court, petitioners' $7,000,000 of bearer bonds and cash, pending Court trial of respondents' own foreclosure action. The District Court found (Appx. I, p. 185, 122 F. Supp. 960, 997):

> "That by the failure and refusal of the Federal Home Loan Bank of San Francisco to execute a receipt . . . that such bonds and cash shall be held as collateral security only, and not otherwise, and are subject to any final judgment in the action commenced by them, now bearing No. 13979, and by various statements by their counsel in Court, and from all proceedings had herein and in related matters, Federal Home Loan Bank of San Francisco threatens that unless the equity powers of this Court are exercised it will, or will attempt to, apply the said cash and interest coupons on said U. S. government bonds, received by it upon said conservator's notes, and sell at private sale, without notice and without the right of redemption under claimed rights so to do, the said $5,300,000 Government bonds. . . ."

This finding is also unreversed by the Court of Appeals.

During the course of certiorari applications to the U. S. Supreme Court in 1953, respondents had represented

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[12]See footnote 3 hereof.

that no homeowners' titles were threatened with foreclosure.

Thereafter in 1954, respondent San Francisco Bank recorded in the Los Angeles County, California, Recorder's Office, and filed in its own foreclosure action 13979, a written disclaimer in the nature of a quit claim to all of petitioners' 8,000 homeowner borrowers.

On filing of such disclaimer, the U. S. District Court entered a summary judgment, quieting the titles of all said homeowners against any threatened foreclosure by respondent San Francisco Bank.

Notwithstanding its disclaimer, respondent San Francisco Bank resisted the quiet title judgment in the District Court, and appealed such quiet title judgment to the Court of Appeals. Respondents also appealed from the order retaining petitioners' $7,000,000 of U. S. Bearer bonds and cash in Court pending trial of respondents' own foreclosure action. By the 1955 Court of Appeals writ of mandamus, all pleadings upon which said quiet title judgments were based, are dismissed.

8. Respondents Ask Court of Appeals for Original Writs of Mandamus and Injunction to Compel Secret Foreclosure.

On June 4, 1954, respondents filed their original petition in the Court of Appeals for mandamus against Honorable Peirson M. Hall, U. S. District Judge, who had quieted the homeowners' titles, and prevented the secret foreclosure.

Respondents also sought original writs of injunction to prohibit petitioners from defending against said secret foreclosure, and to compel dismissal of the pleadings upon which said homeowners' quiet title judgments were made.

The Court of Appeals issued an order to show cause and amended order to show cause, which were served

only upon said U. S. District Judge. Copies were mailed to some, but not all, of counsel for petitioners.

No personal service was ever made on any of petitioners individually.

9. Congress Removes Basis for Court of Appeals Original Writs by Vesting Jurisdiction in the U. S. District Court.

Petitioners and respondents, and all liabilities, obligations, debts, and claims of any against the others, were created by, and arose from, the creation of the Federal Savings System by Congress.

Petitioner Federal Savings Association derives its existence, and its 30,000 depositors and 8,000 borrowers obtain their rights from, Federal Home Loan Bank law.[13]

Respondents Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, Federal Home Loan Bank of San Francisco, *et al.*, all are created by, and their existence continues under, Federal Home Loan Bank law.

On August 2, 1954, during the pendency of this litigation, both in the U. S. District Court and in the Court of Appeals, the Housing Act of 1954, enacted by Congress, became effective. By its terms, it repealed, amended, and superseded all other law. It reads in part:

> "ACT CONTROLLING.
>
> "SEC. 818. Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling."

On that date there was pending, undecided, before the Court of Appeals, these original proceedings for original writs of mandamus and injunction, sought by respondents

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[13] *Federal Home Loan Bank Act*, Title 12 U. S. C. §§1422, *et seq.*; *Home Owners' Loan Act of 1933*, Title 12 U. S. C. §§1462-1464, *et seq.*; *National Housing Act*, Title 12 U. S. C. §§1724-1725, *et seq.*

against petitioners.[14] There was also pending in the U. S. District Court, respondents' $7,000,000 foreclosure action (13979) brought by respondents as plaintiffs in 1952, against petitioners as defendants, in which other petitioners were cross-defendants.

There also were pending various other U. S. District Court actions between various of the petitioners and repondents. All such actions involved issues arising from the creation of petitioners and respondents under the *Federal Home Loan Bank Act, Home Owners' Loan Act,* and *National Housing Act, supra,* and the obligations, liabilities, and duties of savings depositors and homeowner borrowers, in petitioner Federal Savings Association under said Acts.

Jurisdiction of the U. S. Courts over such litigation, under said Acts of Congress, prior to 1954, was the predominant issue, both in said U. S. District Court and in 1952-1953 decisions of the Court of Appeals.[15]

By the Housing Act of 1954, Congress repealed and amended all prior law, and enacted Section 503 of the Housing Act of 1954, which reads in part:

"TITLE V—HOME LOAN BANK BOARD."

". . . The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by

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[14]Petitions for such original writs were filed with the Court of Appeals June 4, 1954, *before* enactment of the Housing Act of 1954 (effective August 2, 1954), were argued February 28, 1955, and decided July 18, 1955, *after* the Housing Act of 1954.

[15]*Home Loan Bank Board v. Mallonee,* 196 F. 2d 336; *Fahey v. O'Melveny & Myers,* 200 F. 2d 420; *Fahey v. Calverley,* 208 F. 2d 197.

registered mail, to the Home Loan Bank Board, Washington, District of Columbia."

Section 501 of the Housing Act of 1954, rendered respondent Federal Savings and Loan Insurance Corporation similarly subject to both jurisdiction and venue of the District Court in this litigation.[16]

Further, Section 503 reads in part:

". . . the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders . . ."

New actions[17] were thereafter filed in the District Court by petitioners, together with applications in the already pending litigation, to apply these remedial, curative and procedural amendments, enacted by Congress in its exercise of an express reserved legislative power of amendment.

10. Congressional Power to Amend Statutes Was Reserved in Notes Involved Herein and in All Corporate Charters of All Federal Savings and Loan Associations and Federal Home Loan Banks Throughout the United States.

Such power of amendment was reserved[18] in the ex-

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[16]See appendix A, p. 9 for text of Sec. 501 of the Housing Act of 1954.

[17]Nos. 17,133, 17,152, 17,153, 17,154. Such actions seek, among other things, accounting, declaratory relief, and return of petitioners' U. S. bonds and cash, alleged collateral for said $7,000,000 denied debt.

[18]It also existed without such reservations, as part of the sovereign power of Congress. *Gelfert v. National City Bank*, 313 U. S. 221; *Home Bldg. & L. Assoc. v. Blaisdell*, 290 U. S. 398, 435; *Veix v. Sixth Ward Bldg. & Loan Assoc. of Newark*, 310 U. S. 32.

press terms of each of the Conservator's notes[19] for $7,000,000, sought to be foreclosed, and in the charters of respondent San Francisco Bank,[20] and petitioner Federal Savings Association.[21]

11. Respondents Asked, and Congress Refused, to Exempt This Litigation From the Housing Act of 1954.

Respondents sought from Congress an exception expressly exempting this then pending litigation and its subject matter, including the original writs sought from the Court of Appeals, from the effect of the Housing Act of 1954. During progress of the amendments through Congress, the Senate enacted such an amendment, but the House refused to consent to such exception.

A letter[22] was written by B. T. Fitzpatrick, General Counsel of the Housing and Home Finance Agency, to the Senate Committee on Banking and Currency, on June 17, 1954. This letter reads in part:

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[19]Each of the four alleged Conservator's notes (totaling $7,000,000) contains a provision reading:

"The rights, powers, and privileges conferred upon the Federal Home Loan Bank Board and/or member banks by the 'Federal Home Loan Bank Act,' approved July 22, 1932, as in force at the date of the execution hereof *and/or as hereafter amended,* are hereby made a part of the provisions of this note . . ." (Emphasis added) (Appx. I, p. 136).

[20]The charter of Federal Home Loan Bank of San Francisco reads in part:

"6. This Certificate is made for the purpose of carrying out the provisions of the Act of Congress, known and cited as the Federal Home Loan Bank Act, approved July 22, 1932, *and such other acts as may be passed by Congress amending or supplementing* the said Federal Home Loan Bank Act, in so far as it or they may be applicable to the Federal Home Loan Bank . . ." (Emphasis added).

[21]The charter of petitioner Long Beach Association, Sec. 3, Objects and powers, reads in part:

". . . The Association shall have such powers . . . in conformity with the Home Owners' Loan Act of 1933 and all laws of the United States as they now are, *or as they may hereafter be amended,* . . ." (Emphasis added).

[22]See appendix A, p. 1 for copy of letter.

"There is but one pending suit to which the provision would be applicable, *i. e.*, the California litigation, . . . The Court of Appeals for the Ninth Circuit has issued an order to the District Court and the litigants to show cause why that litigation should not be permanently enjoined. . . ."

After receipt of this letter, the House and Senate Joint Conference Committee rejected the amendments, the Senate receded and both House and Senate repassed the Housing Act of 1954, *with the Senate amendments deleted.*[23]

12. The Court of Appeals Enacted Laws Congress Refused to Pass.

The Housing Act became effective August 2, 1954. Thereafter petitioners applied to the United States District Court for leave to amend the pleadings in the pending actions to show jurisdiction, pursuant to said Housing Act and to 28 U. S. C. §1653.[24]

The District Court had not yet considered or acted upon such pending applications to amend. The Court of Appeals in July 1955, almost one year after the effective date of the Housing Act of 1954, nullified such Congres-

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[23]During the enactment of the Housing Act of 1954, at the urging of counsel for the respondents' parent, the Housing and Home Finance Agency, the Senate enacted, and later withdrew, amendments. To Section 501, the Senate added the language:

"'. . . Provided, That the provisions hereof relating to service of process shall not be applicable to any pending court action or suit or to any action or suit involving the subject matter or part thereof, of such pending action or suit.'";

To Section 503, the Senate added the language:

"'. . . Nothing in this subsection relating to jurisdiction, venue, service of process or suability of the Board shall be applicable to any pending court action, or suit, or to any action, or suit involving the subject matter or part thereof, of such pending action or suit.' . . ."

(100 Cong. Rec. 6886-6887).

[24]Text of 28 U. S. C. §1653 is:

"1653. Amendment of pleadings to show jurisdiction

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

sional amendments and said they could have no application to the pending litigation, despite the Congressional mandate to the contrary. The Court of Appeals said (Slip Op. p. 40, Appx. B):

> ". . . the language in question should and must be regarded as purely *prospective* in its application . . ."

13. The Court of Appeals Repeals Statutes Congress Has Enacted.

The Housing Act of 1954 became effective August 2, 1954. *After* the effective date of said Act, and prior to the July 1955 decision of the Court of Appeals, petitioners filed new actions in the United States District Court,[25] pursuant to jurisdiction thereby conferred. Said Housing Act says in part:

> ". . . the provisions of this Act shall be controlling."[26]

Petitioners new actions were filed under, and in express reliance on, the jurisdiction conferred on the District Court thereby. Yet the Court of Appeals ruled that the filing of such actions "constitutes an abuse of the process of said District Court" (Slip Op. p. 71, Appx. B), and enjoined petitioners from exercise of their statutory rights, expressly conferred by the Acts of Congress.

The Court of Appeals thus directly repealed statutes enacted by Congress.

Reasons for Granting the Writ.

A. Congressional Control Over Federal Savings System Nullified.

The charters of 1,640[27] Federal Savings and Loan Associations, 11 Federal Home Loan Banks, and the $867,-

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[25]Numbered therein, 17133, 17152, 17153, and 17154.

[26]Section 818, Housing Act of 1954, Appendix A, p. 17.

[27]All figures are approximate. Figures are from reports to Congress and publications of Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, and similar sources.

478,000 of notes and debts of such associations to such banks, all contain express reservations that they shall exist and be governed by Acts of Congress:[28]

(1) "as hereafter amended" (terms of notes);

(2) "as they may hereafter be amended" (charters of Federal Savings and Loan Associations); and

(3) "such other acts as may be passed by Congress amending or supplementing" (charters of Federal Home Loan Banks).

By such reserved power to make future amendments, Congressional changes in law are instantaneously operative upon all existing assets and liabilities of all such Federal Savings and Loan Associations, Federal Banks, and their over 12,000,000 depositors and borrowers, and over $16,000,000,000 of deposited savings and loans on homes.

Pursuant to such reserved power of amendment, Congress, by the Housing Act of 1954, has subjected every member of the Federal savings system, including respondent Home Loan Bank Board, the 11 Federal Home Loan Banks, the Federal Savings and Loan Insurance Corporation, and all 1,640 Federal Savings Associations, to the jurisdiction of the United States Courts in every United States Judicial District wherein is situated the home office of any Federal Savings Association.

The effect of such changes in law, made under a reserved power to amend, is long settled. In *United States Mortgage Co. v. Matthews,* 293 U. S. 232, 237:

> ". . . the words employed [the laws of Maryland or any amendments or additions thereto] seem to us sufficient to embrace the amendments and additions thereafter made . . ."

See also: *Helmholz v. Horst,* 294 Fed. 417 (C. A. 6, (1924)); *White v. United States,* 270 U. S. 175.

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[28]See page 15 hereof for full text of reservations in charters and notes.

Even without such express reservations in the charters, notes, etc., of power to amend, legislative control over public savings institutions and foreclosures has been held immediately applicable to prior contracts.[29]

But the Court of Appeals refuses to apply such amendments to existing causes of action or to pending litigation.

B. Power of Congress Over Jurisdiction of Federal Courts Is Repudiated by Court of Appeals.

The power of Congress to confer or withdraw jurisdiction of the United States Courts is absolute.[30] The power includes pending, as well as future, actions in all such Courts.

Absence of jurisdiction in 1946-53 does not preclude Congress from conferring jurisdiction in 1954. It is long settled that:

> "No one has a vested right in any given mode of procedure."[31]

Nor can prior decisions, based on a *then* absence of jurisdiction, be *res judicata* to prevent Congress remedying the defect by later conferring jurisdiction.

Unless pending actions and existing controversies are *expressly* mentioned, and excepted, they are included in every action of Congress conferring, or removing, jurisdiction of the Federal Courts.

Such rule has special application when the jurisdiction conferred is over federal agencies. *Missouri Pacific Railway Company v. United States,* 189 U. S. 274, 282:

> ". . . no hearing was had before the Commission concerning the matters of fact complained of, and therefore no finding of fact whatever was made

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[29]See footnote 18 hereof.

[30]U. S. Constitution, Art. I, §8, cl. 9 and 18.

[31]*Ex parte Collett,* 337 U. S. 55, 72; *Crane v. Hahlo,* 258 U. S. 142, 147.

by the Commission . . . the question . . . is whether, under such circumstances, the . . . United States . . . were authorized to institute this suit.

"Testing this question by the law which was in force at the time when the suit was begun and when it was decided below, we are of the opinion that the authority to bring the suit did not exist.

"But this is not the case under the law as it now exists, since power to prosecute a suit like the one now under consideration is expressly conferred by an act of Congress adopted since this cause was argued at bar, . . .

". . . by the . . . act conflicting laws are repealed, it is provided, 'but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law [italics ours] *and as modified by the provisions of this act.*' We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, . . . [Order] remanding the cause to the circuit court for such further proceedings as may be consistent with the Act . . . as subsequently amended. . . ."[32]

In *Ex Parte Collett,* 337 U. S. 55, 71:

". . . Petitioner suggests that his action may not be transferred because it was instituted prior to the effective date of the Code. Clearly, §1404 (a) is a remedial provision applicable to pending actions . . ."

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[32]The Housing Act of 1954 repealing clause is even broader. Sec. 818 reads:

". . . Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling."

In *Smallwood v. Gallardo,* 275 U. S. 56, 61:

> ". . . To apply the statute to present suits is not to give it retrospective effect but to take it literally and to carry out the policy that it embodies . . ."

In *The Baltimore and Potomac Railroad Company v. Grant,* 98 U. S. 398, 403:

> ". . . There is nothing in the statute which indicates any intention to make a difference between suits begun and those not begun . . . if it had been the intention to confine the operation . . . to judgments thereafter rendered or to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, . . ."[33]

As already made crystal clear herein,[34] respondents expressly and directly asked, and Congress refused, just such an exception.

Congress even struck from the law the exceptions which respondents persuaded the Senate to pass. Respondents exceptions were rejected by the House.

Yet the Court of Appeals has read back into the law and enforced by injunctions, the very provisions which Congress refused and removed.

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[33]The Courts of Appeal agree. *Federal Reserve Bank of Richmond v. Kalin,* 77 F. 2d 50, 51 (C. A. 4, 1935):

> ". . . It is clear that the grant of jurisdiction given by the statute applies to causes of action in existence at the time of its passage as well as to those subsequently arising. 'Statutes relating to practice and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may have arisen before.' [citing authorities]."

In Re Monsen, 74 F. 2d 411, 412 (C. A. 7, 1934); *Silurian Oil Co. v. Essley,* 54 F. 2d 43, 47 (C. A. 10, 1932); *Beatty v. U. S.,* 191 F. 2d 317, 320 (C. A. 8, 1951); *Bowles v. Strickland,* 151 F. 2d 419, 420 (C. A. 5, 1945); *Bowles v. Miller,* 151 F. 2d 992, 993 (C. A. 10, 1945).

[34]See pages 15 to 17 and 22 to 27 hereof.

C. Intent of Congress to Confer Jurisdiction on Federal Courts Over This Litigation, Is Demonstrated by Both Legislative History and Plain Words.

Congress subjected respondents to the jurisdiction of "the United States district court for the district where the home office of such association is located,". Such jurisdiction included "any matter under . . . any . . . law or regulation . . ."

As was said in *Ex Parte Collett*, 337 U. S. 55, 58:

> ". . . The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from 'any civil action.' "

Further at 61:

> ". . . there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history . . .' . . ."[35]

and in *Unexcelled Chemical Corp. v. U. S. A.*, 345 U. S. 59, 64:

> ". . . when Congress, . . . has used language which plainly brings a subject matter into a statute, its word is final . . ."

In the applicable provisions of the Housing Act of 1954 there is no ambiguity. Further, its legislative history leaves no room for any doubt or construction by the Court of Appeals to remove this litigation from the plain, clear, and direct words of Congress.

The legislative history of Title V, "HOME LOAN BANK BOARD," Sections 501, 502, 503 and 818, of the Housing Act of 1954, extends over an 8-year period.

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[35]Citing: *Gemsco, Inc. v. Walling*, 324 U. S. 244, 260; *Packard Motor Car Co. v. National Labor Relations Bd.*, 330 U. S. 485, 492; *United States v. American Trucking Assoc.*, 310 U. S. 534, 543, and cases there cited.

As was said in *Ex Parte Collett,* 337 U. S. 55, 65:

> "This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code . . ."

In the instant case, Congress in 1946 first gave its attention to this litigation and the need it demonstrated to amend Home Loan Bank law.

The House "Select Committee to Investigate Acts of Executive Agencies Beyond the Scope of Their Authority," on June 12, 13, 14, 1946, heard 23 witnesses, took 274 pages of oral testimony, and received hundreds of pages of written statements and exhibits,[36]—*all* concerning this litigation and its subject matter.

The Committee, in 1946, filed its 27 page unanimous report condemning the seizures which precipitated this litigation. Among the recommendations of such report were:

> "(4) That the Commissioner revoke the order appointing a conservator for the Federal Savings and Loan Association of Long Beach and restore the assets and affairs of the association to its duly elected management, *and render a proper accounting* for the same, as expeditiously as is consistent with judicial determination of the questions at issue . . .
>
> "(5) That the appropriate committees of Congress give consideration to the necessity (if, in the opinion of such committees, the necessity exists) of amending the Federal Home Loan Bank Act in the following particulars: . . .
>
> "(c) Prohibiting the agency from appointing conservators for any member association, except under specific and well-defined limitations." (Emphasis added.)[37]

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[36]H. R. Rep. No. 2659, 79th Cong., 2d Sess., Pg. 27.
[37]See Appendix A, pp. 5-8.

Nor did the attention of Congress cease with such report. Four years later petitioners had been unable to compel respondents to account, and were now threatened with a second seizure. The "Special Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Eighty-First Congress, Second Session" then commenced its "Investigation of the Home Loan Bank Board." This was the second Congressional investigation of respondents, their seizures, and obstructive tactics in this litigation.

During 1950-51-52, 36 days of oral testimony was taken by said Committee. 50 witnesses were heard, 2,133 pages of oral testimony, and thousands of pages of written statements and exhibits received.

The witnesses before both Congressional Committees included the then heads of respondent agencies and banks, their general counsel, and numerous of their staff. All testimony before both Congressional Committees referred to this very litigation, its causes or legislation required by it.

Before the first Committee, respondents' predecessor testified:

> "Mr. Fahey: Suit . . . entered in the Federal court in an effort to regain control of this institution . . . has set up the false and hypocritical cry that I acted in this matter in reprisal . . . It is assumed that the courts will presently determine the justification for our action."[38]

Yet for 9 years, all respondents have denied all jurisdiction of the United States Courts, even over their own $7,000,000 foreclosure action, filed by them as plaintiffs.

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[38]Page 105 of "Hearings Before The Special Committee To Investigate Executive Agencies, House of Representatives, Seventy-Ninth Congress, Second Session, Pursuant to H. Res. 88, Part 7, Complaints of Federal Home Loan Bank of Los Angeles and Federal Savings and Loan Association of Long Beach Against The Federal Home Loan Bank Administration."

Honorable J. Alston Adams, then a member of respondent Bank Board, and now President of respondent Federal Home Loan Bank of San Francisco, testified, referring to the seizures,[39] as follows:

> ". . . the acts were arbitrary and capricious and vindictive . . ."

The pendency of this litigation was urged repeatedly upon both Committees as a reason for withholding Congressional action. Perhaps as a result, the second Committee made no report, but, in November 1952, the Court of Appeals in this litigation, in *Fahey v. O'Melveny & Myers,* 200 F. 2d 420, at 479, said:

> ". . . Nor has Congress since amended the Home Loan Bank Act to provide for such a review. The simplest kind of an amendment would have achieved such a result . . ."

Thereafter the House bill, which became the Housing Act of 1954, was introduced in Congress.

That Congress specifically intended the all inclusive language of such remedial legislation to apply to this then pending litigation is conclusively established by the progress of such legislation through the Congress. The Act was first passed by the House.[40] It then went to the Senate. When passed by the Senate, Section 501 was amended to include the language:

> "'. . . Provided, That the provisions hereof relating to service of process shall not be applicable any pending court action or suit or to any action or suit involving the subject matter or part thereof, of such pending action or suit.'";

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[39]Page 259, "Hearings Before A Special Subcommittee Of The Committee On Expenditures In The Executive Departments, House of Representatives, Eighty-First Congress, Second Session, and Eighty-Second Congress, First and Second Sessions, Investigation Of The Home Loan Bank Board."

[40]100 Cong. Rec. 4490.

To Section 503, the Senate added the language:

> "'. . . Nothing in this subsection relating to jurisdiction, venue, service of process or suability of the Board shall be applicable to any pending court action, or suit, or to any action, or suit involving the subject matter, or part thereof, of such pending action or suit.' . . ." (100 Cong. Rec. 6886-6887).

A letter was written by B. T. Fitzpatrick, General Counsel of the Housing and Home Finance Agency, to the Senate Committee on Banking and Currency, on June 17, 1954.[41] This letter read in part:

> "There is but one pending suit to which the provision would be applicable, *i. e.,* the California litigation, . . ."

After receipt of this letter, the House and Senate Joint Conference Committee[42] rejected the above quoted amendments, the Senate receded, and both House and Senate repassed the Housing Act of 1954, *with the Senate amendments deleted.*

It is fundamental that provisions which Congress considered, but refused to enact, cannot thereafter be made into statutory law by Court interpretation.

Prior amendments by Congress to this same section of Home Loan Bank law were considered in *Hopkins Federal Savings and Loan v. Cleary,* 296 U. S. 315. The language of the Court demonstrates that such Congressional action is given great weight. At page 334 the Court said:

> ". . . The form chosen by its draftsman for the statute here involved takes on a new significance when read in the revealing light of *the forms that were rejected.*

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[41]See Appx. A, p. 1 for copy of letter.

[42]"Congress legislates in its committee rooms." *Ex Parte Collett,* 337 U. S. 55, 66.

"We think the light is so strong as to flood whatever places in the statute might otherwise be dark . . . " (Emphasis added.)

In *United States v. National City Lines,* 337 U. S. 78, 82:

". . . this change in the law must have been known to the Government in time for it to have addressed the protests which we have heard to the Congress . . ."

Again at 84:

". . . a protest was made which Congress disregarded. Neither alternative would offer the slightest justification for overriding the unequivocal words . . . and the legislative history which establishes that Congress indeed meant what it said."[43]

The protests made here by the respondents to the Congress were not only disregarded, but expressly rejected.

D. The Court of Appeals Here Turns Its Prior Decisions Based Upon Lack of Jurisdiction, Into Final Decisions of the Merits.

The Court of Appeals rests its original "writ of mandamus" and "injunction" against *"re*-litigation', wholly on finality of its prior appellate decisions[44] as *"res judicata"* of *untried* merits. But all three decisions were based upon *lack* of jurisdiction.

In *Fahey v. Calverley,* 208 F. 2d 197, at 199, the Court

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[43]See also: *St. Joe Paper Co. v. Atlantic C. L. R. Co.,* 347 U. S. 298, 316, 330; *H. Rouw Company v. Crivella,* 310 U. S. 612, 613; *Cudahy Packing Company v. Holland,* 315 U. S. 357, 366, 367; *Milk Wagon D. Union v. Lake Valley Farm Products,* 311 U. S. 91, 103.

[44]*Home Loan Bank Board v. Mallonee,* 196 F. 2d 336 (cert. den. without opinion, 345 U. S. 952); *Fahey v. O'Melveny & Myers,* 200 F. 2d 420 (cert. den. without opinion, 345 U. S. 952); *Fahey v. Calverley, Receiver,* 208 F. 2d 197 (cert. den. without opinion, 347 U. S. 955).

of Appeals summarized its own prior holdings by saying:

> ". . . in Home Loan Bank Board v. Mallonee, 196 F. 2d 336, and Fahey v. O'Melveny & Myers, 200 F. 2d 420; cert. denied 345 U. S. 952, rehearing denied 345 U. S. 978. This Court there determined that the District Court was without jurisdiction of the subject matter of either of said consolidated actions . . ."

It is basic that the jurisdiction of a U. S. Court of Appeals is solely derivative and appellate.

An appellate Court cannot decide the *merits* of a case the trial Court is without jurisdiction to hear. In *United States of America v. Corrick,* 298 U. S. 435, 440:

> ". . . While the District Court lacked jurisdiction we have jurisdiction on appeal, *not of the merits* but merely for the purpose of correcting the error of the lower court in entertaining the suit . . ." (Emphasis added.)

This rule is universal.[45]

Yet the Court of Appeals now "perpetually" enjoins petitioner from *defending,* in a Court with jurisdiction expressly given by Congress, the merits it would not permit heard in petitioners' prior actions as plaintiff.

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[45] *S. S. Kresge Co. v. Amsler,* 99 F. 2d 503 (C. A. 8, 1938), at 507:

> "The lower court being without jurisdiction to determine the issues on the merits, this court is likewise without jurisdiction to do so, and we pretermit any discussion of them . . ."

In *Cramer v. Phoenix, Etc., Co.,* 91 F. 2d 141 (C. A. 8, 1937) at 144:

> ". . . The jurisdiction of the appellate court ends when it finds want of jurisdiction in the lower court . . ."

Piedmont & N. R. Co. v. United States, 280 U. S. 469, 478; *Smallwood v. Gallardo,* 275 U. S. 56, 62; *Smallwood v. Santani,* 275 U. S. 62, 63; *Stratton v. St. Louis Southwestern Railway Company,* 282 U. S. 10, 18; *Alabama v. United States,* 282 U. S. 502, 506.

E. Prior Decisions Made "Without Jurisdiction of the Subject Matter" Are Now Held by the Court of Appeals Herein to Be Res Judicata of the Merits.

If the United States District Court was without jurisdiction, the Court of Appeals is equally powerless.

Yet, the Court of Appeals now holds that in its prior opinions, on appeals which resulted *only* in dismissal for lack of jurisdiction, it has decided and made *res judicata, without trial,* the merits it would not permit the District Court to either hear or try. In *Murray v. Pocatello,* 226 U. S. 318, 324, speaking for a unanimous Supreme Court, Justice Holmes said:

> ". . . Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were . . ."

In *In re N. L. R. B.,* 304 U. S. 486, 494:

> ". . . if it [the Court] finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith . . ."

This rule is universal.[46]

F. Matters Never Contained in Any Previous Mandate or Judgment, Are Now Held Res Judicata and Compelled by Mandamus.

No previous mandate or judgment of the Court of Appeals had ever directed or adjudged dismissal of action 5421. Instead the combined[47] mandate directed dismissal

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[46]See also: *Hughes v. U. S.,* 71 U. S. 232, 237; *Smith v. McNeal,* 109 U. S. 426, 430; *Detroit Trust Co. v. Dunitz,* 59 F. 2d 905, 906 (C. A. 6, 1932); *Meyer v. Kansas City So. Ry. Co.,* 84 F. 2d 411, 415 (C. A. 2, 1936); *Gensinger v. C. I. R.,* 208 F. 2d 576, 579 (C. A. 9, 1953).

[47]Two cases, 5421 and 5678, were consolidated in the U. S. District Court. In 1950, two separate appeals, 12511 and 12591, were taken. The appeals were never consolidated. After separate decisions and opinions (196 F. 2d 336 and 200 F. 2d 420) in each appeal, joint certiorari applications were made and denied. Thereafter, a single *combined* mandate was issued from the Court of Appeals enforcing both its separate judgments on appeal.

of action 5678, and only certain enumerated pleadings in action 5421. *Action 5421 was not ordered dismissed.*

Respondents were authors of the 1953 mandate. They drafted and submitted it. The Court of Appeals adopted and issued it.

In respondents' oppositions to certiorari in 1954 (Nos. 656, 659, Oct. T. 1953), they attached as exhibits to their oppositions in No. 656, both the 1953 mandate [as Ex. A] and the "Order dismissing pleadings in accordance with mandate" [as Ex. B], signed by the District Court December 11, 1953. On page 5 of No. 656 respondents state:

> "The Court of Appeals thereupon issued its mandate, dated May 21, 1953, remanding the proceedings to the District Court with directions to dismiss the principal pleadings, . . .[8] Pursuant to this mandate, the District Court, on December 11, 1953, dismissed the pleadings . . ."

Footnote 8 reads:

> "8. The Court of Appeals did not direct the dismissal of the entire proceedings but only of certain pleadings. The reason for this procedure was apparently that a number of home owners who sought to discharge their mortgages during the pendency of the conservatorship had been drawn into this maelstrom of proceedings and had been awarded—unnecessarily, as we believe—judgments directing reconveyances by the trustee. Rather than cast doubt upon the validity of these decrees, the mandate was drawn in such terms as to exempt them from its operation . . ."

On page 3 of No. 659 respondents state:

> "Thereafter, the mandate issued by the Court of Appeals . . . directed the dismissal of the principal pleadings in the Long Beach case . . . and the complete dismissal of the Los Angeles action.[2]"

"2. While the District Court complied with the mandate as far as the Long Beach action was concerned, . . . (*cf. Mallonee v. Fahey*, 117 F. Supp. 259, 270-273)."

Respondents thus represented to this Court in 1954 that the mandate of which they were the authors had been "complied with", without dismissal of action 5421!

No application to recall, amend, or expand the mandate was ever made.[48]

The Housing Act of 1954 became effective August 2, 1954. Action 5421 was then still pending before the District Court. Many other pleadings not among those ordered dismissed yet remained.

The requirements of the mandate for dismissal of the *enumerated* pleadings, but not the action 5421, had been meticulously carried out by the District Court. It said (*Mallonee v. Fahey,* 117 F. Supp. 259, 273):

> ". . . On the face of the mandate it becomes apparent that the appellate court intended a *different result in 5421* than they did in *5678* inasmuch as they used the plain language, 'dismiss *civil action 5678*' and, *'dismiss the following pleadings* in civil action *5421*' . . ."

Respondents cited the above language to this Court as compliance with the 1953 mandate. Thereafter petitioners made application to the District Court pursuant to 28 U. S. C. §1653[49] to amend the pleadings in yet pending action 5421 to exercise jurisdiction expressly conferred by the 1954 Housing Act amendments.[50]

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[48]An unrecalled mandate cannot be expanded to include matters never therein directed. See *Briggs v. Pennsylvania R. Co.,* 334 U. S. 304, 306.

[49]28 U. S. C. §1653 reads:

> *"§1653. Amendment of pleadings to show jurisdiction*
> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

Also in *Levinson v. Deupree,* 345 U. S. 648, 652:

> "We hold that federal practice controls the question whether the administrator, . . . should be permitted to amend . . . And we hold that the administrator should be permitted to do so . . ."

[50]See Appx. A, p. 12 for text of Section 503, Housing Act of 1954.

Before the District Court could even consider such applications to amend, the Court of Appeals issued its original mandamus, commanding "forthwith" dismissal of action 5421, and ALL pleadings therein.

Such dismissal was ordered by the Court of Appeals in July 1955, a year after the effective date of the Housing Act of 1954, and after respondents' representations to the Supreme Court that "the District Court complied with the mandate as far as the Long Beach action was concerned,".

The 1955 Original Writ of Mandamus was based upon dismissals discussed, but not ordered, in 1952-53 opinions and never incorporated into ANY previous judgment or mandate.

In *Rogers v. Hill,* 289 U. S. 582, 587:

> ". . . The opinion of the Circuit Court of Appeals did indeed deal with matters affecting the merits but the decree did not extend beyond mere reversal of the order from which the appeal was taken . . . The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests . . . [citing authorities]
>
> "Moreover, if the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose. But, assuming it included the opinion, the mandate would not prevent the district court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues and take other proceedings . . ."

Yet, the Court of Appeals now commands "forthwith" dismissal of action 5421 as *"res judicata"* although it was never previously ordered dismissed.

G. Administrative Remedies Have Been Exhausted.

In 1946 respondents told the Congressional Investigating Committee, referring to this litigation:

> "Suit has been entered in the Federal court . . . It is assumed that the courts will presently determine the justification for our action."[51]

But in Court, respondents claimed immunity from all jurisdiction of the Federal Courts. For 9 years respondents have insisted "exhaustion of administrative hearings" was a prerequisite to Court jurisdiction, and in 1952, the Court of Appeals so held.

Thereafter, in 1953, and again in 1955, petitioner Association applied to respondent Bank Board for administrative action to protect $7,000,000 of its savings deposits from secret foreclosure without trial or redemption. Both times respondent Bank Board refused such action.[52]

Petitioner asked respondent Bank Board for an administrative hearing[53] to consider orders to protect petitioners' $7,000,000 of deposited savings from secret foreclosure.

Respondent Bank Board refused to grant any administrative hearing or even to consider any such order. It ruled:

> ". . . said petition is hereby denied for the reason that the Federal Home Loan Bank Board is without authority to grant the relief sought . . ."

Thus for 9 years respondents have whipsawed petitioners

---

[51]See footnote 38 hereof for reference to Congressional Committee hearings.

[52]In 1953, it refused to make any order, but said "The Board . . . requests that the Bank not dispose of this security without first conferring with the Board." Despite such "request" respondent San Francisco Bank yet threatened secret foreclosure.

[53]Petitioners application, made to respondent Bank Board August 9, 1955, read in part:

> "WHEREFORE, petitioner prays: . . .
>
> "3. That hearings, upon notice, at times and places of reasonable convenience to the parties, be held by, or under the direction of, said Home Loan Bank Board, . . ."

between Congress, the Courts, and administrative hearings. Respondents have denied the authority of whatever body they were before at the moment. Congress was told ". . . the courts will . . . determine the justification for our action." The Courts were told respondents' "administrative hearings" alone had authority. Thereafter respondents denied their own administrative authority.

Congress, disgusted at this evasion, removed "exhaustion of administrative remedies" as a prerequisite to applying "to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief . . . [and provided] . . . said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders." (Housing Act of 1954, Sec. 503.)

Respondent Conservator was removed in 1948. No hearing to consider removal of a Conservator already removed, is now possible.

Except when it is appointing a conservator, receiver, etc., respondent Bank Board now cannot even schedule any administrative hearings until *after* expiration of the 30 day period specified in Section 503 of the Housing Act, for *first* applying to the Court for "a declaratory judgment and an injunction or other relief."[54]

"Administrative remedies" denied because respondent "Board is without authority to grant the relief", cannot preclude petitioners from defending in Federal Court against the secret foreclosures respondent Bank Board refused to hear or halt.

H. Court of Appeals Substitutes Original Mandamus and Injunction for Undecided Trials and Appeals.

Actions are pending in the District Court unheard and untried.[55] Such actions involve the *merits* of issues never

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[54]See Appendix A, p. 12, for full text of Sec. 503, Housing Act of 1954.

[55]See footnote 10 for résumé of action 13979, and footnote 17 for actions 17,133, 17,152, 17,153 and 17,154.

previously before this Court, or the Court of Appeals. One of the unheard issues of such actions is jurisdiction expressly conferred by Congress on the U. S. *District* Court in 1954, *after,* and as a result of, 1952-53 decisions of the Court of Appeals.

Among the untried actions is respondents' own foreclosure action 13979, commenced by them as plaintiffs to foreclose $7,000,000 of petitioners' 30,000 savings depositors and the homes of 8,000 of petitioners' homeowners.

Respondents have taken two appeals in their own foreclosure action.[56]

Said appeals also present issues never previously before the Court of Appeals, or the Supreme Court, on any prior appeals. They are pending, docketed, unbriefed, and unargued. Yet the Court of Appeals has, by its original writs of mandamus and injunction, decided both said untried actions and unheard appeals in advance of trial or hearing. It has reversed the order of the United States District Court preventing secret foreclosure and retaining petitioners' $7,000,000 of bearer bonds and cash in Court pending trial. It has also reversed the quiet title judgments protecting the 8,000 homeowners against foreclosure.

Such reversals are accomplished by original writ of mandamus commanding: (1) The Clerk of the District Court to defy the unreversed order of the District Court to retain petitioners' $7,000,000 pending trial, and on the contrary to pay it over "forthwith" to respondent San Francisco Bank, thereby exposing it to secret foreclosure before trial; and (2) the United States District Judge

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[56](1)Appeal 14,587 from the order of the U. S. District Court quieting petitioners' 8,000 homeowners' titles to their respective homes against respondents' threatened foreclosure; and (2) Appeal 14,632 from the order of the U. S. District Court retaining petitioners' $7,000,000 of U. S. bearer bonds and cash in Court, and preventing secret foreclosure thereof, pending trial.

to dismiss, untried, petitioners' homeowners and savings depositors defenses to secret foreclosure.

Substitution of mandamus for trial and appeal is contrary to the law of this case, established by this Court in *Ex Parte Fahey,* 332 U. S. 258, 259:

> "Mandamus, prohibition and injunction against judges are drastic . . .
>
> "We find nothing in this case to warrant their use . . ."

It is also contrary to an unbroken line of decisions of this Court that mandamus cannot be substituted for trial and appeal.[57]

Conclusion.

Trial on the merits has never been held, yet the Court of Appeals:

1. Has erroneously decided important questions of Federal law which have not been, but should be, settled by this Court; *i. e.,* has denied immediate application of the remedial amendments of the Housing Act of 1954 to all Federal Savings and Loan Associations and Federal Home Loan Banks, notwithstanding Congressional power to so amend expressly reserved in the charters and debt obligations of all said Associations and Banks.

2. Has erroneously decided Federal questions in conflict with applicable decisions of this Court; *i. e.,* has repudiated the power of Congress to make procedural amendments conferring jurisdiction on Federal Courts

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[57] *Bankers Life & Cas. Co. v. Holland,* 346 U. S. 379, 383:

> ". . . whatever may be done without the writ may not be done with it . . ."
>
> "We adhere to the language of this Court in *Ex parte* Fahey . . ."

See also: *Roche v. Evaporated Milk Ass'n,* 319 U. S. 21, 30; *United States v. Rice,* 327 U. S. 742; *Ex Parte Park Square Auto, etc.,* 244 U. S. 412; *Ex Parte Harding,* 219 U. S. 363, 372; *Ex Parte Rowland,* 104 U. S. 604; *Ex Parte Roe,* 234 U. S. 70.

immediately apply to pending actions and existing causes of action.

3. Has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; *i. e.* (a) has erroneously made prior decisions based wholly on absence of jurisdiction, *res judicata* to preclude trial of unheard merits, (b) has erroneously substituted Original Writs of Mandamus and Injunction to decide, ***without trial,*** the merits of actions pending untried in the District Court, and to decide without hearing, appeals pending unheard in said Court of Appeals—all contrary to law and to *Ex Parte Fahey,* 332 U. S. 258, the law of this case in this litigation.

Certiorari should therefore be granted.

Respectfully submitted,

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Attorney for petitioners, Long Beach Federal Savings and Loan Association and First Federal Savings and Loan Association of Bellflower,

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Attorney for petitioners, Mallonee, Bucklin, and Fergus, acting as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association,

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CHARLES K. CHAPMAN,
Attorneys for Petitioner, Title Service Company, as trustee on homeowners' trust deeds,

RAYMOND TREMAINE,
Attorney for petitioner, Robert H. Wallis,

EMMETT E. DOHERTY,
Attorney for petitioner, John D. Willhoit.

ADDENDA.

Appendix Reference.

A combined appendix is filed herewith, bound as separate volumes A and B. Also 9 copies of appendices I and II, as filed with the Court of Appeals, are also filed herewith. Appendix references herein are to such A or B or I or II.

As these were *original* proceedings in the Court of Appeals there was no printed record. Nor was any testimony taken.

Opinions Below.

United States District Court Opinions:

117 F. Supp. 259, is pages 35 to 98 of Appendix A, filed herewith.

122 F. Supp. 401, is pages 1 to 152 of Appendix I before Court of Appeals;

122 F. Supp. 960, is pages 189 to 258 and 301 to 382 of Appendix II, and pages 170 to 188 of Appendix I before Court of Appeals.

Court of Appeals Opinions.

225 F. 2d Adv. 349 in slip opinion form, is Appendix B filed herewith.

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Appendix B:

Opinion of U. S. Court of Appeals Here Sought to Be Reviewed by Certiorari (Bound in Separate Volume, as Appendix B)

IN THE

Supreme Court of the United States

October Term, 1955

No. .....

MALLONEE, *et al.*,

Petitioners,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Respondents.

APPENDIX A TO COMBINED CERTIORARI PETITION OF CERTAIN PETITIONERS.

A. LEGISLATIVE HISTORY.

1. **Letter of General Counsel of Housing and Home Finance Agency to Senate Committee on Banking and Currency, Re Amendments to 1954 Housing Act.**

[Agency Seal] HOUSING AND HOME FINANCE AGENCY
OFFICE OF THE ADMINISTRATOR—Washington 25, D. C.

June 17, 1954.

Mr. Joseph P. McMurray
Senate Committee on Banking and Currency
United States Senate
Washington 25, D. C.

Dear Joe:

You requested my comments on memoranda submitted to you objecting to the Senate Amendments to H. R. 7839

which would except pending litigation from provisions in the bill relating to jurisdiction, venue, service of process, and suability of the Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation.

One of these Senate amendments would add the following to section 503 of the Bill (which relates to the appointment of conservators and receivers for Federal Savings and Loan associations):

> "Nothing in this subsection relating to jurisdiction venue, service of process or suability of the Board shall be applicable to any pending court action, or suit, or to any action or suit involving the subject matter, or part thereof, of such pending action or suit."

Objection is made to the inclusion of this provision on the ground that there is pending at the present time an action for declaratory relief which involves interpretation of the laws governing the Home Loan Bank System, the appointment of conservators by the Board, and the accountability of such conservators. It is contended that the effect of the provision would be to prohibit future suits against the Home Loan Bank Board if the subject matter of such suits or parts thereof involve in any way the broad range of questions in the pending litigation. This is not true. The wording of the provision is the usual wording of a savings clause which excepts pending litigation from the provisions of new statutory provisions. It has been well accepted as such for years by the courts. The reference to the "subject matter" involved in the suits refers only to the facts being litigated in the particular case. It in no way applies to any new litigation. It only prevents the same parties in the pending suit from again

bringing up the same case. The same question can be raised by other parties involving the same or similar facts. The same parties can still litigate similar questions having any different facts. In other words, the objection is completely unfounded. If there were any way of making the provision more clear, there would be no objection to doing so. However, inasmuch as this is the most clear-cut language possible in view of its long history of use and acceptance by the courts, it would be a mistake to change it in any manner.

There is but one pending suit to which the provision would be applicable, *i.e.,* the California litigation, which the Court of Appeals for the Ninth Circuit and the Supreme Court have already decided. It appears to be the intent on the part of those litigants to continue that litigation *ad infinitum,* and the objections to the above provision are undoubtedly for that reason. The Court of Appeals for the Ninth Circuit has issued an order to the District Court and the litigants to show cause why that litigation should not be permanently enjoined. Actually, therefore, those litigants by objection to inclusion of the quoted provision in the bill seek to obtain Congressional sanction to the continuance of litigation which the Court of Appeals and the Supreme Court of the United States have said has no foundation in law. The Appellate Court's decisions were based on the legal issues involved aside from the questions of service of process or suability of the Board. Those decisions made a determination of the legal issues involved in the litigation. Therefore, it is entirely clear that the only purpose of the objection to the Senate amendment is the prolongation of this one pending suit which the Court of Appeals said should have been

dismissed long ago on grounds other than the questions of service, venue or suability.

The following Senate amendment would except pending litigation from the new provision in section 501 of the bill to make clear that service may be made upon the Federal Savings and Loan Insurance Corporation outside the District of Columbia:

> ". . . Provided, That the provisions hereof relating to service of process shall not be applicable to any pending court action or suit or to any action or suit involving the subject matter, or part thereof, of such pending action or suit."

Objection is made to this provision on the grounds that it is worded ambiguously and in certain cases would prohibit suits against the Corporation. This objection is obviously unfounded. Since its creation the Corporation has been amenable to suit and it is so provided in the statute creating it. Anyone who has occasion to bring an action against the Corporation may do so by service on the Corporation in Washington. This Senate amendment is merely for the purpose of avoiding any delay which might otherwise result in pending litigation as a result of section 501. It would in no way nullify the right to sue the Corporation—a right which has existed since its creation 20 years ago.

Sincerely yours,

/s/ FITZ
B. T. Fitzpatrick
General Counsel

[Postcript handwritten]

P. S. Prior to recommending these amendments to the Senate Banking and Currency Committee, the language thereof was also cleared with the General Counsel of the United States Savings and Loan League and the General Counsel of the National Savings and Loan League.

F.

2. **Conclusions and Recommendations of H. R. Report No. 2659, 79th Congress, 2d Session, Re Investigation of Home Loan Bank Administration.**

Union Calendar No. 819

79th Congress, 2d Session

HOUSE OF REPRESENTATIVES

Report No. 2659

INVESTIGATION OF EXECUTIVE AGENCIES

July 25, 1946.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Smith of Virginia, from the Select Committee to Investigate Executive Agencies, submitted the following

TENTH INTERMEDIATE REPORT

[Pursuant to H. Res. 88]

* * * * * * * * *

CONCLUSION

The action here complained of was not only a disservice to the Government but also a greater disservice to the

people for the protection of whose rights and affairs our Government exists. Should the time come when our Government is incapable of discharging that fundamental function it must cease to exist in the form and for the purpose for which it was founded. The same end is inevitable for any endeavor with which the Government is identified. The necessity for unquestioned rectitude of purpose and sound, just and impartial administration of governmental endeavor is paramount.

The Federal Home Loan Bank System was created to meet a need which the Nation experienced. It is a potential factor in the era which lies ahead of us. The functions of this Government agency loom up as far more important in the future than it has ever been. Unless its administration is elevated to a higher esteem and undergoes decided improvements, its efficiency will be seriously impaired.

Recommendations

The recommendations of your committee are—

(1) That the Commissioner revoke the order reducing the number of districts from 12 to 11 in the Federal Home Loan Bank System.

(2) That the Commissioner take all necessary steps to reestablish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders by which the assets of these two district banks were intermingled.

(3) Should the Commissioner, in the light of the evidence adduced before your committee, still adhere to the opinion that the number of districts should be reduced from 12 to 11, and is still of the opinion that he has the

legal authority to reduce the number of districts, he should proceed to give due notice of such intention to all of the associations in the area affected, hold hearings, and give due weight to the recommendations of the officials of the banks involved and to the views of the associations which are members of the regional banks affected, and should likewise take into consideration the views of the industry generally. Any sudden and unheralded action, such as that taken in the case of the Los Angeles bank, is certain to have an unfavorable effect on the confidence of the public in the institutions involved.

(4) That the Commissioner revoke the order appointing a conservator for the Federal Savings and Loan Association of Long Beach and restore the assets and affairs of the association to its duly elected management, and render a proper accounting for the same, as expeditiously as is consistent with judicial determination of the questions at issue. Your committee questions whether the law ever contemplated that the Board should have the extraordinary power to seize and appoint a conservator for a solvent institution as a part of the supervisory functions entrusted to the Board over member banks.

(5) That the appropriate committees of Congress give consideration to the necessity (if, in the opinion of such committees, the necessity exists) of amending the Federal Home Loan Act in the following particulars:

(*a*) Clarifying the authority of the Board in the matter of approval of elective officers of the regional banks to the end that neither the Board nor other officials may exercise such authority arbitrarily.

(*b*) Clarifying the authority of the Board or the Administrator to increase or decrease the number of regional

banks, and specifying the condition and procedure under which such changes may be made.

(*c*) Prohibiting the agency from appointing conservators for any member association, except under specific and well-defined limitations.

(6) It developed in the hearings that the order relating to the appointment of a conservator for the Federal Savings and Loan Association of Long Beach had not been filed with the Federal Register, as required by law. The Division of the Federal Register advised your committee that only on three occasions has the Federal Home Loan Bank Administration complied with the requirement that its orders be filed with the Federal Register. Your committee further recommends that the Administrator comply with the law in this respect in the future.

HOWARD W. SMITH.
JOHN J. DELANEY.
HUGH PETERSON.
ALBERT GORE.
FRED A. HARTLEY, JR.
JOHN JENNINGS, JR.
CLARE E. HOFFMAN.

B. APPLICABLE STATUTES.

1. Portions of Housing Act of 1954, 68 Stat. 590, Secs. 501, 502, 503, and 818.

Public Law 560—83d Congress
Chapter 649—2d Session
H. R. 7839
AN ACT

All 68 Stat. 590

To aid in the provision and improvement of housing, the elimination and prevention of slums, and the conservation and development of urban communities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Housing Act of 1954."

Housing Act of 1954.

* * * * * * * *

TITLE V—HOME LOAN BANK BOARD

SEC. 501. The National Housing Act, as amended, is hereby amended—

Federal Savings and Loan Insurance Corp.
12 U.S.C. 1725.
Service of process.

(1) by amending section 402(c)(4) to read as follows:

"(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Home Loan Bank Board and mailing a copy of such process by registered mail to the Corporation at Washington, District of Columbia.";

(2) by adding the following new subsection to section 405:

12 U.S.C. 1728.
Claims.
Statute of limitations.

"(c) No action against the Corporation to enforce a claim for payment of insurance upon an insured account of an insured institution in default shall be brought after the expiration of three years from the date of default unless, within such three-year period, the conservator, receiver, or other legal custodian of the insured institution shall have recognized such insured account as a valid claim against the insured institution and the claim for payment of insurance shall have been presented to the Corporation and its validity denied, in which event the action may be brought within two years from the date of such denial."; and

12 U.S.C. 1730. Termination of insurance.

(3) by striking the first four sentences of section 407 and inserting the following: "Any insured institution other than a Federal savings and loan association may terminate its status as an insured institution by written notice to the Corporation. Whenever in the opinion of the Home Loan Bank Board any insured institution has violated its duty as such or has continued unsafe or unsound practices in conducting the business of such institution, or has knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured institution is subject, said Board shall first give to the authority having supervision of the institution, if any, a statement with respect to such practices or violations for the purpose of securing the correction thereof and shall give a copy thereof to the institution. In the case of an institution of a State where there is no supervisory authority the statement shall be sent directly to the institution. Unless such correction shall be made

within one hundred and twenty days or such shorter period of time as the supervisory authority, if any, shall require, the Home Loan Bank Board, if it shall determine to proceed further, shall give to the institution not less than thirty days' written notice of intention to terminate the status of the institution as an insured institution, and shall fix a time and place for a hearing before the Home Loan Bank Board, a member thereof, or a person designated by the Board. The Home Loan Bank Board shall make written findings. Unless the institution shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured institution. If the Home Loan Bank Board shall find that any unsafe or unsound practice or violation specified in such notice has been established and has not been corrected within the time above prescribed in which to make such correction, the Home Loan Bank Board may issue its order terminating the insured status of the institution effective on a date subsequent to such finding and to the expiration of the time specified in such notice of intention. The hearing hereinabove provided for shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to review as therein provided and the review by the court shall be upon the weight of the evidence. In the event of the termination of such status, insurance of its accounts to the extent that they were insured on the date of such notice by the institution to the Corporation or such order of termination, less any amounts thereafter withdrawn, repurchased, or redeemed which reduce

Hearing.

60 Stat. 237.
5 U.S.C. 1001 note.

the insured accounts of an insured member below the amount insured on the date of such notice or order, shall continue for a period of two years, but no investments or deposits made after the date of such notice or order of termination shall be insured. The Corporation shall have the right to examine such institution from time to time during the two-year period aforesaid. Such insured institution shall be obligated to pay, within thirty days after any such notice or order of termination, as a final insurance premium, a sum equivalent to twice the last annual insurance premium paid by it."

12 U.S.C. 1430. Home mortgage as security.

SEC. 502. The Federal Home Loan Bank Act, as amended, is hereby amended by striking "$20,000" in section 10(b)(2) and inserting "$35,000."

SEC. 503. The Home Owners' Loan Act of 1933, as amended, is hereby amended—

12 U.S.C. 1464.

(1) by striking "$20,000" wherever it appears in the first paragraph of subsection (c) of section 5 and inserting "$35,000";

(2) by amendment subsection (d) of section 5 to read as follows:

Enforcement. Rules and Regulations.

"(d)(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in subsection (d)(2) hereof, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, com-

plain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in subsection (d)(2) hereof. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall

Hearing.

60 Stat. 237.
5 U.S.C. 1001 note.

be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Home Loan Bank Board, Washington, District of Columbia.

U. S. district court. Jurisdiction.

"(2) The grounds for the appointment of a conservator or receiver for a Federal savings and loan association shall be one or more of the following: (i) insolvency in that the assets of

Conservators and receivers. Appointment.

such association are less than its obligations to its creditors and others, including its members; (ii) violation of law or of a regulation; (iii) the concealment of its books, records, or assets or the refusal to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Home Loan Bank Board; and (iv) unsafe or unsound operation. The Board shall have exclusive jurisdiction to appoint a Supervisory Representative in Charge, conservator, or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint ex parte and without notice a Supervisory Representative in Charge to take charge of said association and its affairs who shall have and exercise all the powers herein provided for conservators and receivers. Unless sooner removed by the Board, such Supervisory Representative in Charge shall hold office until a conservator or receiver, appointed by the Board after notice as herein provided, takes charge of the association and its affairs, or for six months, or until thirty days after the termination of the administrative hearing and final proceedings herein provided, or until sixty days after the final termination of any litigation affecting such temporary appointment, whichever is longest. The Board shall have the power to appoint a conservator or receiver but no such appointment of a conservator or receiver shall be made except pursuant to a formal resolution of the Board stating the grounds therefor and except notice thereof is

Supervisory Representative in Charge. Appointment.

given to said association stating the grounds therefor and until an opportunity for an administrative hearing thereon is afforded to said association. Such hearing shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to review as therein provided and the review by the court shall be upon the weight of the evidence. A conservator shall have all the powers of the members, the directors, and officers of the Federal association and shall be authorized to operate it in its own name or conserve its assets in the manner and to the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for any Federal savings and loan association, which shall have power as receiver to buy at its own sale subject to approval by the Board. With the consent of the association expressed by a resolution of the board of directors or of its members, the Board is authorized to appoint a conservator or receiver for a Federal association without notice and without hearing. The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations and for such associations in conservatorship and receivership and for the conduct of conservatorships and receiverships. Whenever a Supervisory Representative in Charge, conservator, or receiver, appointed by the Board pursuant to the provisions of this section, demands possession of the property, business and assets of any association, the refusal of any officer, agent, employee, or director of such association to comply with the demand shall be punishable by a fine of

60 Stat. 537.
5 U.S.C. 1001 note.
Powers.

Violation.

not more than $1,000 or by imprisonment for not more than one year or both by such fine and imprisonment"; and

Penalty.

(3) by striking out the second paragraph of subsection (c) of section 5 and inserting in lieu thereof the following new paragraph:

12 U.S.C. 1464.

"Without regard to any other provision of this subsection except the area requirement such associations are authorized to invest a sum not in excess of 15 per centum of the assets of such association in loans insured under title I of the National Housing Act, as amended, in unsecured loans insured or guaranteed under the provisions of the Servicemen's Readjustment Act of 1944, as amended, and in other loans for property alteration, repair, or improvement: *Provided*, That no such loan shall be made in excess of $2,500."

Investment of assets.

58 Stat. 284. 38 U.S.C. 693 note.

* * * * * * *

ACT CONTROLLING

SEC. 818. Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling.

* * * * * * *

Approved August 2, 1954.

2. Portions of Home Owners' Loan Act of 1933, as Amended, 48 Stat. 128, 12 U. S. C., Sec. 1462 Et Seq.

(a) Sec. 1462. Definitions.

As used in this chapter—

(a) The term "Board" means the Home Loan Bank Board.

(b) The term "Corporation" means the Home Owners' Loan Corporation created under section 1463 of this title.

(c) The term "home mortgage" means a first mortgage on real estate in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead and which has a value of not to exceed $20,000; and the term "first mortgage" includes such classes of first liens as are commonly given to secure advances on real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 1464 of this chapter. June 13, 1933, c. 64, §2, 48 Stat. 128; June 27, 1934, c. 847, §508(a), 48 Stat. 1264; May 28, 1935, c. 150, §10, 49 Stat. 296.

(b) Sec. 1464. Federal Savings and Loan Associations—Organization Authorized.

(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe,

to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: *Provided,* That not more than $35,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $35,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon; *And provided further,* That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank or in the obligations of the Federal National Mortgage Association: *And provided further,* That any such association which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter. In addition to the loans and investments otherwise authorized, such associations may purchase, subject to all the provisions of this paragraph except the area restriction, loans secured by first liens on improved real estate which are insured under the pro-

visions of the National Housing Act, as amended, or insured as provided in the Servicemen's Readjustment Act of 1944, as amended.

Without regard to any other provision of this subsection except the area requirement such associations are authorized to invest a sum not in excess of 15 per centum of the assets of such association in loans insured under subchapter I of chapter 13 of this title, in unsecured loans insured or guaranteed under the provisions of the Servicemen's Readjustment Act of 1944, as amended, and in other loans for property alteration, repair, or improvement: *Provided,* That no such loan, unless so insured or guaranteed, shall be made in excess of $2,500. (As amended by 1954 Housing Act.)

(d)(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in paragraph (2) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such

association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this

section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Home Loan Bank Board, Washington, District of Columbia.

(2) The grounds for the appointment of a conservator or receiver for a Federal savings and loan association shall be one or more of the following: (i) insolvency in that the assets of such association are less than its obligations to its creditors and others, including its members; (ii) violation of law or of a regulation; (iii) the concealment of its books, records, or assets or the refusal to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Home Loan Bank Board; and (iv) unsafe or unsound operation. The Board shall have exclusive jurisdiction to appoint a Supervisory Representative in Charge, conservator, or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint ex parte and without notice a Supervisory Representative in Charge to take charge of said association and its affairs who shall have and exercise all the powers herein provided for conservators and receivers. Unless sooner removed by the Board, such Supervisory Representative in Charge shall hold office until a conservator or receiver, appointed by the Board after notice as herein provided, takes charge of the association and its affairs, or for six months, or until thirty days after the termination of the administrative hearing and final proceedings herein provided, or until sixty days after the final termination of any litigation affecting such temporary appointment, whichever is longest. The Board

shall have the power to appoint a conservator or receiver but no such appointment of a conservator or receiver shall be made except pursuant to a formal resolution of the Board stating the grounds therefor and except notice thereof is given to said association stating the grounds therefor and until an opportunity for an administrative hearing thereon is afforded to said association. Such hearing shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to review as therein provided and the review by the court shall be upon the weight of the evidence. A conservator shall have all the powers of the members, the directors, and officers of the Federal association and shall be authorized to operate it in its own name or conserve its assets in the manner and to the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for any Federal savings and loan association, which shall have power as receiver to buy at its own sale subject to approval by the Board. With the consent of the association expressed by a resolution of the board of directors or of its members, the Board is authorized to appoint a conservator or receiver for a Federal association without notice and without hearing. The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations and for such associations in conservatorship and receivership and for the conduct of conservatorships and receiverships. Whenever a Supervisory Representative in Charge, conservator, or receiver, appointed by the Board pursuant to the provisions of this section, demands possession of the property, business and assets of any association, the refusal of any officer, agent, employee, or director of such association to comply with the demand shall be punishable by a fine of not more than $1,000 or by imprisonment for not more than one year or both by such fine and imprisonment. (As amended by 1954 Housing Act.)

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in chapter 11 of this title with respect to other members.

[No issue concerning the following subsections is involved. They are therefore not printed here.]

(g) Loans to redeem foreclosed property.

(h) Appraisal rules.

(i) Payment of loans in bonds of corporation.

(j) Officers and employees; compensation; free use of mails.

(k) When designated for that purpose by the Secretary of the Treasury, any Federal savings and loan association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal savings and loan association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States. June 13, 1933, c. 64, §5, 48 Stat. 132; Apr. 27, 1934,

c. 168, §§5, 6, 48 Stat. 645, 646; May 28, 1935, c. 150, §18, 49 Stat. 297; Aug. 10, 1939, c. 666, Title IX, §909, 53 Stat. 1402.

3. Portions of Federal Home Loan Bank Act, as Amended, 47 Stat. 725, 12 U. S. C., Sec. 1421, Et Seq.

(a) Sec. 1430. Advances—Authorization to Make; Limitation on Amount.

(a) Each Federal Home Loan Bank is authorized to make advances to its members upon the security of home mortgages, or obligations of the United States, or obligations fully guaranteed by the United States, subject to such regulations, restrictions, and limitations as the Board may prescribe. Any such advance shall be subject to the following limitations as to amount:

(1) If secured by a mortgage insured under the provisions of subchapters I, II, VI, VIII or X of chapter 13 of this title, the advance may be for an amount not in excess of 90 per centum of the unpaid principal of the mortgage loan.

(2) If secured by a home mortgage given in respect of an amortized home mortgage loan which was for an original term of six years or more, or in cases where shares of stock, which are pledged as security for such loan, mature in a period of six years or more, the advance may be for an amount not in excess of 65 per centum of the unpaid principal of the home mortgage loan; but in no case shall the amount of the advance exceed 60 per centum of the value of the real estate securing the home mortgage loan.

(3) If secured by a home mortgage given in respect of any other home mortgage loan, the advance shall not be for an amount in excess of 50 per centum of the unpaid principal of the home mortgage loan; but in no case

shall the amount of such advance exceed 40 per centum of the value of the real estate securing the home mortgage loan.

(4) [Not applicable. Not printed.]

(b) Home Mortgages as security. [No issue concerning this subsection is involved. It is therefore not printed here.]

(c) Such advances shall be made upon the note or obligation of the member or nonmember borrower secured as provided in this section, bearing such rate of interest as the board may approve or determine, and the Federal Home Loan Bank shall have a lien upon and shall hold the stock of such member as further collateral security for all indebtedness of the member to the Federal Home Loan Bank. At no time shall the aggregate outstanding advances made by any Federal Home Loan Bank to any member exceed twelve times the amount paid in by such member for outstanding capital stock held by it or made to a nonmember borrower exceed twelve times the value of the security required to be deposited under subsection (e) of section 1426 of this title.

(d) The institution applying for an advance shall enter into a primary and unconditional obligation to pay off all advances, together with interest and any unpaid costs and expenses in connection therewith according to the terms under which they were made, in such form as shall meet the requirements of the bank and the approval of the board. The bank shall reserve the right to require at any time, when deemed necessary for its protection, deposits of additional collateral security or substitutions of security by the borrowing institution, and each borrowing institution shall assign additional or substituted security when and as so required. Subject to the approval of the board, any Federal Home Loan Bank shall have power to sell to any other Federal Home Loan Bank, with

or without recourse, any advance made under the provisions of this chapter, or to allow to such bank a participation therein, and any other Federal Home Loan Bank shall have power to purchase such advance or to accept a participation therein, together with an appropriate assignment of security therefor. July 22, 1932, c. 522, §10, 47 Stat. 731; Apr. 27, 1934, c. 168, §10, 48 Stat. 646; June 27, 1934, c. 847, §501, 48 Stat. 1261; May 28, 1935, c. 150, §§5, 6, 49 Stat. 294, 295; Mar. 28, 1941, c. 31, §7, 55 Stat. 62.

(b) Sec. 1431. Powers and Duties of Banks—Borrowing Money; Issuing Bonds and Debentures; General Powers.

* * * * * * * * *

(d) The board shall have full power to require any Federal Home Loan Bank to deposit additional collateral or to make substitutions of collateral or to adjust equities between the Federal Home Loan Banks.

(c) Sec. 1432. Incorporation of Banks; Corporate Powers.

The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more than ten years; to sue and be sued, to complain and to defend, in any court of competent jurisdiction,

State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and repeal by-laws, rules, and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this chapter, as are customary and usual in corporations generally. July 22, 1932, c. 522, §12, 47 Stat. 735.

4. Portions of National Housing Act, as Amended, 48 Stat. 1246, 12 U. S. C., Sec. 1724 Et Seq.

(a) Sec. 1724. Definitions.

As used in this subchapter—

(a) The term "insured institution" means an institution whose accounts are insured under this subchapter.

(b) The term "insured member" means an individual, partnership, association, or corporation which holds an insured account. Each officer, employee, or agent of the United States, of any State of the United States, of the District of Columbia, of any Territory of the United States, of Puerto Rico, of the Virgin Islands, of any county, of any municipality, or of any political subdivision thereof, herein called "public unit," having official custody of public funds and lawfully investing the same in an insured institution shall, for the purpose of determining the amount of the insured account, be deemed an insured

member in such custodial capacity separate and distinct from any other officer, employee, or agent of the same or any public unit having official custody of public funds and lawfully investing the same in the same insured institution in custodial capacity. Funds held in fudiciary capacity, when invested in an insured institution, shall be insured in an amount not to exceed $10,000 for each trust estate, and notwithstanding any other provisions of this chapter, such insurance shall be separate from and additional to that covering other investments by the owners of such trust funds or the beneficiaries of such trust estates. As amended July 16, 1952, c. 883, 66 Stat. 727.

(c) The term "insured account" means a share, certificate, or deposit account of a type approved by the Federal Savings and Loan Insurance Corporation which is held by an insured member in an insured institution and which is insured under the provisions of this subchapter.

(d) The term "default" means an adjudication or other official determination of a court of competent jurisdiction or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of liquidation. June 27, 1934, c. 847, §401, 48 Stat. 1255.

(b) Sec. 1725. Creation of Federal Saving and Loan Insurance Corporation.

(a) There is hereby created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corporation"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of a board of trustees, to be composed of five members and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this subchapter. The members of the Federal Home Loan Bank Board shall constitute the board of trustees of the Corporation and

shall serve as such without additional compensation. The principal office of the Corporation shall be in the District of Columbia.

(b) The Corporation shall have a capital stock of $100,000,000, which shall be divided into shares of $100 each. The total amount of such capital stock shall be subscribed for by the Home Owners' Loan Corporation which is hereby authorized and directed to subscribe for such stock and make payment therefor in bonds of the Home Owners' Loan Corporation. The Corporation shall issue to the Home Owners' Loan Corporation receipts for payment for or on account of such stock, which shall serve as evidence of the ownership thereof, and the Home Owners' Loan Corporation shall be entitled to the payment of dividends on such stock out of net earnings at a rate equal to the net interest rate on such bonds, which dividends shall be cumulative.

(c) On June 27, 1934, the Corporation shall become a body corporate and shall be an instrumentality of the United States, and as such shall have power—

(1) To adopt and use a corporate seal.

(2) To have succession until dissolved by Act of Congress.

(3) To make contracts.

(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Home Loan Bank Board and mailing a copy of such process by registered mail to the Corporation at Washington, District of Columbia.

(5) To appoint and to fix the compensation, by its board of trustees, of such officers, employees, attorneys, or agents, as shall be necessary for the performance of its duties under this title, without regard to the provisions

of any other laws relating to the employment or compensation of officers or employees of the United States. Nothing in this subchapter or any other provision of law shall be construed to prevent the appointment and compensation as an officer, attorney, or employee of the Corporation, of any officer, attorney, or employee of any board, corporation, commission, establishment, executive department, or instrumentality of the Government. The Corporation, with the consent of any board, corporation, commission, establishment, executive department, or instrumentality of the Government, including any field service thereof, may avail itself of the use of information, services, and facilities thereof in carrying out the provisions of this subchapter. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this chapter and the manner in which the shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. All necessary expenses in connection with the making of supervisory or other examinations (except examinations of Federal home loan banks), including the provision of services and facilities therefor, shall be considered as nonadministrative expenses.

(d) For the purposes of this subchapter, the Corporation shall have power to borrow money, and to issue notes, bonds, debentures, or other such obligations upon such terms and conditions as the board of trustees may determine. Moneys of the Corporation not required for current operation shall be deposited in the Treasury of the United States, or upon the approval of the Secretary of the Treasury, in any Federal Reserve bank, or shall be invested in obligations of, or guaranteed as to principal and interest by, the United States. When designated for that purpose by the Secretary of the Treasury, the Corporation shall be a depository of public money under

such regulations as may be prescribed by the Secretary of the Treasury, and may also be employed as fiscal agent of the United States, and it shall perform all such reasonable duties as depositary of public money and fiscal agent as may be required of it.

(e) All notes, bonds, debentures, or other such obligations issued by the Corporation shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, capital, reserves, surplus, and income, shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

(f) Repealed. Aug. 2, 1954, c. 649, Title VIII, §802 (b), 68 Stat. 642.

(g) No individual, association, partnership, or corporation shall use the words "Federal Savings and Loan Insurance Corporation," or any combination of any of these words which would have the effect of leading the public in general to believe there was any connection, actually not existing, between such individual, association, partnership, or corporation and the Federal Savings and Loan Insurance Corporation, as the name under which he or it shall hereafter do business. No individual, association, partnership, or corporation shall advertise or otherwise represent falsely by any device whatsoever that his or its accounts are insured or in anywise guaranteed by the Federal Savings and Loan Insurance Corporation, or

by the Government of the United States, or by any instrumentality thereof; and no insured member shall advertise or otherwise represent falsely by any device whatsoever the extent to which or the manner in which its accounts are insured by the Federal Savings and Loan Insurance Corporation. Every individual, partnership, association, or corporation violating this subsection shall be punished by a fine of not exceeding $1,000, or by imprisonment not exceeding one year, or both. June 27, 1934, c. 847, §402, 48 Stat. 1256; May 28, 1935, c. 150, §22, 49 Stat. 298.

(h) After June 27, 1950, the Corporation is authorized and directed to pay off and retire annually at par an amount of its capital stock equal to 50 per centum of its net income for the fiscal year. Such payments shall be made promptly after the end of each fiscal year (beginning with the first fiscal year which begins after June 27, 1950) until the entire capital stock of $100,000,000 is retired. In lieu of any and all unpaid dividends, whether for any present, past, or future period, on its capital stock, the Corporation shall pay to the Secretary of the Treasury, promptly after the end of each fiscal year, beginning with the fiscal year 1951, a return on the average amount, at par, of its capital stock outstanding during such fiscal year at a rate determined by the Secretary of the Treasury, taking into consideration the current average rate on outstanding marketable obligations of the United States as of the last day of the sixth month of such fiscal year, and the Corporation shall also pay to the Secretary of the Treasury an amount equal to 2 per centum simple interest per annum on its capital stock of $100,000,000 from June 27, 1934, to June 30, 1950, less any amount heretofore paid by the Corporation as dividends on such capital stock. The retirement of such capital stock shall not affect the applicability to said Corporation of the Government Corporation Control Act, as amended.

(i) The Corporation is authorized to borrow from the Treasury, and the Secretary of the Treasury is authorized and directed to loan to the Corporation on such terms as may be fixed by the Corporation and the Secretary, such funds as in the judgment of the Home Loan Bank Board are from time to time required for insurance purposes, not exceeding in the aggregate $750,000,000 outstanding at any one time, and the Corporation hereafter shall not exercise its borrowing power under the first sentence of subsection (d) of this section for the purpose of borrowing money from any other source: *Provided,* That each such loan shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current average rate on outstanding marketable obligations of the United States as of the last day of the month preceding the making of such loan: *Provided further,* That nothing in this subsection shall prevent the Corporation from issuing debentures in accordance with the provisions of subsection (b) of section 1728 of this title. For the purposes of this subsection the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds of the sale of any securities hereafter issued under the Second Liberty Bond Act, as now or hereafter in force, and the purposes for which securities may be issued under the Second Liberty Bond Act, as now or hereafter in force, are extended to include such loans. Any such loan shall be used by the Corporation solely in carrying out its functions with respect to such insurance. All loans and repayments under this subsection shall be treated as public-debt transactions of the United States. As amended July 3, 1948, c. 825, §2, 62 Stat. 1240; June 27, 1950, c. 369, §§5, 6, 64 Stat. 258; Aug. 2, 1954, c. 649, Title V, §501(1), Title VIII, 802(b), 68 Stat. 633, 642.

C. OPINIONS BELOW.

1. Opinion of U. S. District Court in Mallonee v. Fahey, 117 Fed. Supp. 259, Re Consolidated Mandate of Court of Appeals.

Mallonee *et al.* v. Fahey *et al.* Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of Portland. Civ. Nos. 5421, 5678.

Nov. 30, 1953.

Sylvester Hoffmann, Los Angeles, Cal., Philip H. Angell, San Francisco, Cal., Verne Dusenbery, Portland, Ore., for Federal Home Loan Bank of San Francisco, *et al.*

F. Henry NeCasek, Long Beach, Cal., for Roy E. Hegg and George Turner.

O'Melveny & Myers, Los Angeles, Cal., Richard Fitzpatrick, Los Angeles, Cal., for Federal Home Loan Bank of Los Angeles and Coast Federal Savings & Loan Ass'n, *et al.*

W. I. Gilbert, Jr., Los Angeles, Cal., for Receiver Ernest Utley and for First Federal Savings & Loan Ass'n of Wilmington.

James E. Burns, San Francisco, Cal., Charles Dal Sooy, San Francisco, Cal., Alden Ames, San Francisco, Cal., for Pioneer Investors Savings & Loan Ass'n, *et al.*

Linnell & Smith, Long Beach, Cal., for Harold Lee Newendorp and Charles E. Bradley.

Robert A. Moffitt, Los Angeles, Cal., for Land Title Ins. Co.

Thomas P. Menzies and Harold L. Watt, Los Angeles, Cal., for Home Indemnity Co.

Lyman B. Sutter, Long Beach, Cal., for Title Service Co.

Raymond Tremaine, Los Angeles, Cal., for Robert H. Wallis.

Charles K. Chapman, Long Beach, Cal., for Long Beach Federal Savings & Loan Ass'n.

Westover & Smith, Los Angeles, Cal., for Mallonee, *et al.*

Frank G. Makepeace, Long Beach, Cal., for intervenor, Lillian A. Coggswell.

Crail & Crail, Los Angeles, Cal., for Joe Crail.

Roger W. Powers and Paul L. Zimmerman, Los Angeles, Cal., for Charles Taylor.

Shafer & Seymour, Compton, Cal., for Fred G. Hunter and Melba N. Hunter.

Austin, Austin & Jones, Compton, Cal., for Wayne H. Sones and Helen M. Sones.

Kelsey Petterson, Los Angeles, Cal., for M. E. Spice.

Bates S. Himes, Beverly Hills, Cal., for C. C. Connor, dba Surety Finance & Adjustment Co.

Emmett E. Doherty, Los Angeles, Cal., for plaintiff in intervention, John D. Willhoit.

Ronald Walker, Los Angeles, Cal., Special Master.

HALL, District Judge.

Without attempting to narrate the whole, or even a small portion, of the history of this proliferating litigation, it is necessary, none-the-less, to state some of it for a better understanding of the problems involved in the multitude of motions (29) which were argued for eight days in consolidated actions 5421 and 5678 and related action 13979 of this court.

On May 20, 1946 the Federal Home Loan Bank Administration, by an order No. 5254, designated A. V. Ammann as Conservator of the Long Beach Federal Savings and Loan Association, who, on the same date summarily took possession thereof and of all its assets and properties, for text of Order 5254 see 14 F. R. D. 273, footnote 6.

On May 27, 1946 action No. 5421 was commenced by the filing of a complaint by Mallonee and others as a shareholders committee (California State Corporation Commissioner license No. 80282-La) of the Long Beach Federal Savings & Loan Association, against various de-

fendant officials and others alleging the invalidity of order No. 5254 appointing the conservator and seeking his ouster and the return of the Association to its shareholders. The complaint, among other things, attacked the constitutionality of those provisions of the Federal Home Owners' Loan Act, mainly section 5(d) thereof, 12 U. S. C. A. § 1464(d), relating to the appointment of conservators. A temporary restraining order was issued; a three-judge court was convened under then 28 U. S. C. § 380a (now 28 U. S. C. § 2282 *et seq.*); a hearing was had before the three-judge court on July 15 and 16, 1946 and on September 5, 1946 the three-judge court made its decision, D. C., 68 F. Supp. 418, holding the above mentioned section of the Act unconstitutional and ousting the conservator, requiring accounting, enjoining proposed administrative hearing, and signed a judgment to that effect on September 30, 1946. The next day, October 1, 1946, Justice Rutledge of the Supreme Court stayed the enforcement of the three-judge court order. Appeal was taken to the Supreme Court on October 3, 1946 from the judgment of the three-judge court; on April 7, 1947 on application, and after hearing, the District Court made an order allowing $50,000 on account of attorneys' fees and approximately $17,000 on account of costs, to the shareholders' committee upon which a petition for writ of prohibition, etc. was promptly taken to the Supreme Court for hearing at the same time as the main appeal from the decision of the three-judge court. The matters were argued April 30, 1947 (the Administrative Procedure Act, 5 U. S. C. A. § 1001 *et seq.*, was signed June 11, 1946), and on June 23, 1947 the Supreme Court made its decision, 332 U. S. 245, 67 S. Ct. 1552, 91 L. Ed. 2030, reversing the judgment of the three-judge court but did not direct the dismissal of action No. 5421, and on the same day denied a motion for a writ of prohibition and likewise did not direct the dismissal of the action, 332 U. S. 258, 67 S. Ct. 1552; the

mandate from the Supreme Court was received and spread in the District Court on August 19, 1947.

In the meanwhile, on August 22, 1946, action No. 5678 was commenced by the filing of a complaint by the Federal Home Loan Bank, of Los Angeles and six of its stockholders Associations as a class for all members, seeking restoration of said Los Angeles Bank to its status, location and officials prior to March 29, 1946, and recovery of its assets and attacking the validity of various orders of the Federal Home Loan Bank Administration, all of which were made on March 29, 1946, which summarily provided for the dissolution of the Los Angeles Bank, discharge of its officers and directors, and the transfer of its assets and properties to the Portland Bank, the name of which was changed to the Federal Home Loan Bank of San Francisco, and headquarters therefor removed both from Portland and Los Angeles to San Francisco (for text of orders see 14 F. R. D. 273-283, footnote 5). Under the "low-number rule" of this court, case No. 5678 was transferred to me and thereafter, in due course, on November 7, 1947, an order of consolidation of the two cases for all purposes was made. In the meanwhile (August 26, 1946), the Los Angeles Bank, not joining with any of its members, had filed a cross-claim in action 5421 seeking substantially the same relief it sought in action 5678.

Thereafter, numerous orders were made by the District Court, particularly in connection with interpleaders, by persons owing notes to the Long Beach Association secured by trust deeds, which interpleaders brought approximately a million and a half dollars into Court. Numerous orders were made thereon as well as numerous other orders, among them certain orders allowing attorneys' fees and costs. From several of such orders appeals were taken by the official defendants attacking the jurisdiction of the District Court but all of said appeals were dismissed. Appeals were taken from subsequent orders

allowing attorneys' fees, Master's fees, and the like, some of which are still pending.

On December 1, 1949, an order (14 F. R. D. 273) was made after hearing in the Consolidated case enjoining and restraining an administrative hearing before the Home Loan Bank Board on its order No. 2015 dated September 9, 1949, (for text of order see 14 F. D. R. 273-289, footnote 11), which hearing was set for Washington, D. C. and concerned the administration of the affairs of the Long Beach Federal Building and Loan Association. Neither the order of the Home Loan Bank Board No. 2015, nor the injunction of December 1, 1949, were concerned directly with the subject matter of the Los Angeles Bank action No. 5678.

On December 29, 1949 the Home Loan Bank Board, Federal Savings and Loan Insurance Corporation and the defendants who were officials of the United States, gave notice of appeal from said order for injunction, and on January 5, 1950 the Federal Home Loan Bank of San Francisco gave similar notice. Thereafter, on April 2, 1952, the United States Court of Appeals handed down its opinion in the injunction appeal Home Loan Bank Board v. Mallonee, 9 Cir., 196 F. 2d 336, at page 391 the concluding paragraph of which reads as follows:

"Upon consideration of the whole record we conclude that the order of the lower court dated December 1, 1949, which restrains and enjoins the holding of an administrative hearing called pursuant to the provisions of Order No. 2015 of the Home Loan Bank Board, dated September 9, 1949, was erroneously issued. It is therefore ordered that the said *order for Preliminary Injunction be, and the same is, hereby reversed, and the court below is directed to vacate and set aside the said* injunction." (Italics supplied.)

Subsequently petitions for certiorari were filed and ultimately denied.

On June 19, 1950, after due notice and hearing, this court made its order for allowance of attorneys' fees limited to counsel for plaintiffs in the Los Angeles Bank action No. 5678. On June 20, 1950, the Home Loan Bank Board, Federal Savings & Loan Insurance Corporation, and the various individual defendants who were officials of the United States, filed notice of appeal from that order as did the Federal Home Loan Bank of San Francisco.

On November 6, 1952 the United States Court of Appeals for the Ninth Circuit filed its opinion in the attorneys' fee appeal, Fahey v. O'Melveny & Myers, 200 F. 2d 420, at page 481, in the Los Angeles Bank case, No. 5678, the concluding paragraph of which reads as follows:

"For reasons set forth in this opinion the order of the lower court here on appeal which awards attorneys' fees to appellees is reversed. The validity of the claim for such fees is sustainable only on the theory that the lower court had *jurisdiction in personam over indispensable parties* to the Los Angeles Action and jurisdiction of the subject matter of that action. We have previously held that the court did not have *such jurisdiction* and we therefore remand the case before us with directions to the lower court to dismiss the Los Angeles Action." (Italics supplied.)

Applications for certiorari were likewise made and ultimately denied in that matter.

The appeal from the order of injunction, of December 1, 1949, in action 5421, carried No. 12511 in the appellate court, and the appeal from the order for allowance of attorneys' fees carried No. 12591 in the appellate court. No order of consolidation was made of the appeals in the appellate court.

On May 25, 1953 a Special Assistant to the Attorney General, traveling from Washington, D. C. for that purpose, and without the customary notice to all counsel, presented to the court for spreading, the mandate of the

Court of Appeals which appears to be a consolidated mandate, although no order was ever made on appeal consolidating the two appeals. The mandate reads as follows:

"United States of America, SS: The President of the United States of America to the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division, Greeting:

"Whereas, lately in the United States District Court for the Southern District of California, Central Division, before you or some of you, in consolidated causes between Mallonee, Bucklin and Fergus, *et al.*, plaintiffs, third party plaintiffs and cross-claimants, and John H. Fahey, *et al.*, defendants, Civil No. 5421-P. H.; and between Federal Home Loan Bank of Los Angeles, *et al.*, plaintiffs, and Federal Home Loan Bank of San Francisco, *et al.*, defendants, Civil No. 5678-P.H.; wherein an Order of Preliminary Injunction was duly filed, and entered on the 2nd day of December, 1949, and wherein an Order re allowance of attorneys' fees on account was duly filed and entered on the 19th day of June, 1950; which said orders are of record and fully set out in said causes in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

"And Whereas, the said John H. Fahey, *et al.*, and said Federal Home Loan Bank of San Francisco have appealed to this Court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeable to the Act of Congress, in such cases made and provided, fully and at large appears.

"And Whereas, on the 1st day of May, in the year of our Lord, one thousand nine hundred and fifty one, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Cir-

cuit, on the said transcript of record, and was duly submitted.

"And Whereas, on the 6th day of May, in the year of our Lord, one thousand nine hundred and fifty-two, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted.

"And Whereas, said actions were consolidated in the District Court for all purposes, and a review of decisions in both said appeals was sought by appellees upon consolidated petitions for writs of certiorari to the United States Supreme Court, which said petitions were denied on the 4th day of May, 1953:

"On Consideration Whereof, It is now here ordered and adjudged by this Court that the said orders of the said District Court in these consolidated causes be and hereby are reversed and that said consolidated causes be and hereby are remanded to the said District Court with directions to:

"1. Dismiss Civil Action No. 5678-P.H. at the cost of plaintiffs.

"2. Dismiss the following pleadings in Civil Action 5421-P.H.:

"(a) The complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;

"(b) The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party complainant and cross-claimant;

"(c) The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant;

"(d) The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;

"(e) The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant;

"3. Dissolve, set aside and vacate the order of said District Court entered the 13th day of March, 1948, insofar as the same requires Federal Home Loan Bank of San Francisco to deposit in the Registry of said District Court promissory notes in the aggregate principal amount of $6,300,000.00, collateral securing the same and any other documents or property deposited by San Francisco Bank pursuant to said order; and return to Federal Home Loan Bank of San Francisco without charge or impairment said promissory notes, together with Government bonds in the face amount of $5,300,000.00 with all interest coupons attached thereto at the time of deposit and together with cash from the sum in the Registry of said Court sufficient to make the combined total sum of $6,324,098.35, with interest on $6,300,000.00 at 2% per annum from the 10th day of March, 1948 until the date of such release.

"4. Set aside and vacate said order of preliminary injunction entered the 2nd day of December, 1949.

"You, Therefore, are Hereby Commanded that such proceedings be had in said consolidated causes, in conformity with the opinions and judgments of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

"Witness, the Honorable Fred H. Vinson, Chief Justice of the United States, the 21st day of May in the year of our Lord one thousand nine hundred and fifty three.

Paul P. O'Brien

Clerk, United States Court of Appeals for the Ninth Circuit."

At the time the mandate was offered for spreading there was still pending undecided a petition for rehearing before the Supreme Court.

While the appeals were taken from only the order of injunction of December 1, 1949, in 5421, and only from the order for allowance of attorneys' fees in the Los Angeles Bank case, 5678, the mandate, as appears on its face, is unusual in that it goes a great deal further than a mere disposition or reversal of the two orders from which appeals were taken. The opinion of the Court of Appeals in the injunction case, No. 12511, occupies 56 printed pages in the report and in 12591 the attorneys' fee matter, 62 pages. The record on appeal in 12511 consumed approximately 12,000 printed pages and the files and records in the case in this court, to date, in 5421 and 5678 are colossal, occupying several filing cabinets of 4 drawers each. Innumerable hearings had been held in the consolidated cases and hundreds of orders made affecting numerous parties and things besides the main litigants so that it became apparent, before complying with the insistent demands of appellants' counsel, and in order to properly carry out the terms of the mandate that considerable care and study were required of all the matters involved, as the mandate, in addition to requiring specific things, commands such further proceedings, "in conformity with the opinions and judgments of", the Appellate Court, "as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding," .

Counsel for the San Francisco Bank and counsel for the United States Attorneys' Office and the office of the Attorney General indicated considerable provocation and impatience because this court would not forthwith either spread the mandate and enter the judgments which they submitted for entry without an opportunity for this Court to again read and study the opinions of the Appellate Court and in light of them endeavor to make such orders

as in conformity with them and according to right and justice and the laws of the United States ought to be had, the said appeals notwithstanding.

There was then (May 25, 1953) a stay in force, ordered by the appellate court, pending the *final* disposition of cases 12511 and 12591, which stay would have prevented action by this court until disposition of the petitions for rehearing before the Supreme Court, above mentioned. The petitions for rehearing were not denied by the Supreme Court until June 9, 1953, 345 U. S. 978, 73 S. Ct. 1120 and not brought to the attention of this court until sometime later.

The matter again came on for hearing on June 22, and 24, 1953, at which times I was (and advised all counsel that I was), then engaged in the trial of a water rights case at Fresno which had been continuing for some 18 months and which required my presence in Fresno every day of each week except Monday, and beginning in the first part of July it was the duty of this Judge to take the criminal calendar of this court which requires the hearing of all arraignments and pleas and the trial of all criminal cases consuming less than three days for a period of three months' time, and consumes all of a judge's time.

At the various hearings, the Court suggested that, in view of the fact that the mandate covered many things other than the two orders from which appeals were taken, counsel for the prevailing parties on appeal should prepare and submit whatever judgments and orders in their opinion were required to be made and signed by this court.

On July 16, 1953 counsel for the prevailing parties on appeal accordingly filed 14 different judgments and orders as follows:

Proposed Judgment No. 1
Judgment on Mandate.

Proposed Order No. 1
Order Dismissing Complaint, Amended and Supplemental Pleadings Pursuant to Mandate.

Proposed Order No. 2
Order Dismissing Cross-Claim and Third Party Complaint of Long Beach Federal Savings and Loan Association, and All Amendments and Supplements Thereto, Pursuant to Mandate.

Proposed Order No. 3
Order Dismissing Cross-Claim of Federal Home Loan Bank of Los Angeles Pursuant to Mandate.

Proposed Order No. 4
Order Dismissing Cross-Claim in Interpleader of Title Service Company, and All Amendments and Supplements Thereto, Pursuant to Mandate.

Proposed Order No. 5
Order Dismissing Cross-Claim in Interpleader of Robert H. Wallis, and All Amendments and Supplements Thereto Pursuant to Mandate.

Proposed Order No. 6
Order Directing Delivery of Documents and Collateral to Federal Home Loan Bank of San Francisco Pursuant to Mandate.

Proposed Order No. 7
Order Vacating Order of Preliminary Injunction Pursuant to Mandate.

Proposed Order No. 8
Order Dismissing Cross-Claim in Interpleader of George Turner Pursuant to Mandate.

Proposed Order No. 9
Order Dismissing Cross-Claim of Roy E. Hegg Pursuant to Mandate.

Proposed Order No. 10
Order Dismissing Complaint in Intervention of John D. Willhoit Pursuant to Mandate.

Proposed Order No. 11

Order Vacating Orders Re Accounting by A. V. Ammann Pursuant to Mandate.

Proposed Order No. 12

Order Vacating Orders Re Discovery and Inspection Proceedings, Pursuant to Mandate.

Proposed Order No. 13

Order Denying Petition and Supplement to Petition to Interplead or Deposit in Court Disputed Stock Subscription Demands of First Federal Savings and Loan Association of Bellflower, California, Pursuant to Mandate.

All matters again came on for hearing on August 3, 1953, at which time I indicated to counsel that I would be unable to hear the arguments on the various motions and opposition thereto until after the completion of the criminal calendar at the end of September, and set the matter down for hearing with the consent of all counsel, to begin on October 12th, at which time I would not only hear counsel in connection with the proposed judgments and orders, but also hear all motions which had been set in the related case, No. 13979—Federal Home Loan Bank of San Francisco v. Long Beach Federal Savings and Loan Association, which had been filed in the Superior Court of California on March 27, 1952, and removed to this court, and a motion to remand denied. Action 13979 was a suit by the San Francisco Bank to collect on notes of the face amount of $6,300,000 signed by the conservator, and to foreclose on claimed security therefor.

Inasmuch as many of the matters involved in the consolidated cases 5421 and 5678 are also involved in 13979, it was felt necessary that they should be heard together, and accordingly, on October 12th hearing was commenced on the motions for and against the above mentioned judgments and orders in 5421 and 5678, and the following motions in 13979:

1. Hearing on Report of Receiver and Petition for Instructions

2. Hearing on Motion of Federal Home Loan Bank Board to quash service of summons made pursuant to court order filed 3-3-53

3. Hearing on motion of Home Investment Co. *et al.* for summary judgment quieting title to homes of 8000 borrowers against foreclosure of loans paid in full, and motions for summary judgment quieting title of trustee, Title Service Co. and beneficiary Long Beach Federal Savings & Loan Assn. pur. not. filed 5-21-53

4. Hearing on motion of Plaintiff to

(a) Dismiss Homeowners cross-claim for quiet title, and

(b) Strike and drop Home Investment Co. as a party pur. not. filed 5-29-53

5. Hearing on motion of Plaintiff

(a) To drop parties

(b) or for severance and early trial fld 6-5-53

6. Hearing on Motion of Plaintiff

(a) to dismiss cross-claim of defendant Long Beach Fed. Sav. & Loan Assn.,

(b) To strike said cross-claim, fld 6-5-53

7. Hearing on Motion of Plaintiff

(a) To vacate order granting leave to Title Service Co. to intervene and to file its complaint in Intervention and Interpleader, and to strike said pleading,

(b) To dismiss said complaint in Intervention, fld 6-5-53

8. Hearing on Motion of Plaintiff to dismiss 3rd party complaint of Long Beach Fed. Sav. & Loan Assn. (Fld 10-10-52) fld 6-5-53

9. Hearing on Motion of Plaintiff

(a) To vacate order granting leave to Robert H. Wallis to intervene and to file its complaint in intervention and interpleader, and to strike said pleading.

(b) To dismiss said complaint in intervention fld 6-5-53

10. Hearing on Motion of Plaintiff to strike from Answer of deft. Long Beach Fed. Sav. & Loan Assn. fld 6-5-53

Audit of funds in Court

As noted, sub-paragraph No. 3 of the Mandate directs the return of certain bonds and cash in the registry of the court in the within actions, to the Federal Home Loan Bank of San Francisco.

The money on deposit in court was derived not from a single source but from many and as the result of many interpleaders and interventions. And before making any order concerning a definite amount of money it appeared only reasonable and proper that an audit should be made of the funds on deposit in court with a statement as to their source so that in making any order in compliance with the mandate, compliance also might be had with the rules concerning disposition of money deposited in court, laid down by the Ninth Circuit in Berdie v. Kurtz, 88 F. 2d 158. I suggested to the parties that each side might select an auditor and two of them go over the records jointly so that there would be agreement among the parties and not leave such a simple matter to the querulous contentions which have marked this case already overloaded with a multitude of various contentions and innumerable angry and distracting clashes between the many counsel.

The Long Beach Association did make such an audit which was filed on July 16, 1953, and a summary and recapitulation thereof filed on July 23, 1953. Neither

the San Francisco Bank nor the parties represented by the United States Attorney saw fit to make such an audit, or if so they did not see fit to aid the court by filing a copy of it. In connection therewith the court has received only a letter from Mr. Hoffman, one of the counsel for the San Francisco Bank dated September 25, 1953 which, on its face, is not complete. The Court will, therefore, accept as true and accurate the audit and summary and recapitulation thereof as to source of funds, and amounts, made and filed by the Long Beach Federal Savings & Loan Association.

The Appellate Court Stay and Other Pending Appeals

It should be mentioned also that during the pendency of the appeal, while no stay was in effect, this court appointed a Receiver for the purpose of bringing suit both in the federal court and the state court to preserve the running of the statute of limitations against certain asserted causes of action or liability in connection with the administration of the affairs of the Long Beach Association by the conservator and his relationship with the San Francisco Bank. An appeal was taken from the order appointing the Receiver and is currently pending undecided along with appeals taken by the San Francisco Bank from various, but not all, of the orders allowing fees to the Special Master.

Pursuant to the order appointing the Receiver he filed two actions, one in the state court which was removed to this court, and one in this court. Thereafter, a stay of all proceedings in the within consolidated cases, 5421 and 5678, and the Receiver's actions, was made by the appellate court on November 13, 1952 "Until the final disposition of cases No. 12511 and 12591; except that said District Court is hereby permitted to entertain and determine the cause designated as 13979-PH filed in said (this) District Court."

The petitions for rehearing were denied by the Supreme Court on June 9, 1953. On June 24, 1953 the above mentioned mandate of the U. S. Court of Appeals was ordered spread in this court.

I therefore regard the disposition of appeals No. 12511 and No. 12591 as final, and the stay as terminated.

As above stated, appeals are pending undecided in 5421 and 5678 from the order appointing the Receiver and from certain allowance of fees to the Special Master but no stay has been issued in connection therewith and I shall proceed accordingly.

The Preliminary Injunction of December 2, 1949 (Proposed Order No. 7).

Paragraph numbered "4" of the mandate directs this court to "set aside and vacate said order of preliminary injunction entered the 2nd day of December, 1949."

I indicated to all counsel from time to time from the outset of the various hearings since the mandate came down that, whatever else may be said concerning the opinions on appeal and the mandate, there could be no doubt that both the opinion in 12511 and the mandate intended and required that said order of injunction be reversed. It was the only order on which the appeal was taken.

I also indicated to counsel that it seemed to me that an order should be made as promptly as possible to vacate the order of preliminary injunction of December 1, 1949, in order that such administrative hearings might be as promptly proceeded with as were deemed advisable. I also indicated that if counsel would request it I would as promptly as time and the press of other duties would permit, make such an order. Accordingly, without adopting the forms of order proposed by either the prevailing parties on appeal, or the one proposed by those opposing them, I dictated an order dissolving the injunction of

December 1, 1949 and filed it September 21, 1953. Paragraph "4" of the mandate is thus complied with.

The Dismissal of Action No. 5678 at the Cost of Plaintiffs

The mandate, in paragraph "1", directed that this court "dismiss Civil Action No. 5678-PH at the cost of plaintiffs."

No costs were set forth in the mandate.

During the course of the litigation, among the many hundreds of other orders made, an order was made with the consent of, among others, the Long Beach Association and the defendant officials speaking through the U. S. Attorney and the Attorney for the Home Loan Bank Board, appointing Ronald Walker, (then Assistant United States Attorney who had been handling the within litigation for the defendant officials), as Special Master, for the purpose of supervising and directing the carrying out of Order No. 388 of the Home Loan Bank Board and the order of this court of January 23, 1948, directing the return of the Long Beach Association and its assets and properties to the regularly elected officials of said Association and for an accounting by Ammann to the shareholders, and supervising the election of a Board of Directors of said Association, no meeting of shareholders having been had, or election of such officers, since prior to the conservatorship.

Thereafter, on motion for discovery, the court appointed said Ronald Walker as Special Master to supervise the discovery proceedings. The motion for discovery was made by Long Beach Association and its affiliated defendants and was joined in by the plaintiffs in 5678. The purpose of appointing the Special Master was principally to protect the San Francisco Bank in connection with the conduct of its affairs and to protect the public interests against any disclosure of confidential matters which might concern the San Francisco Bank and the affairs of other

building and loan associations, or might otherwise affect the public interest.

The Special Master performed rather prodigious duties in connection with the turn-back of the Association, the election of directors and the meeting of shareholders, and in connection with the discovery proceedings. No final report has yet been made by the Special Master. Interim reports have been filed and interim allowances on his fees, but no final order fixing his fees either on the turn-back and accounting or on the discovery have been made, and, as above stated, appeals are now pending on some, but not all, of the orders allowing fees to the Master.

There can be no doubt concerning the duty of this court in connection with the mandate. It was ordered spread and under the decisions it is my duty to carry it out without attempting to question the correctness of either the appellate court's opinion or decision or the correctness of the mandate. As stated in Thornton v. Carter, 8 Cir., 109 F. 2d 316, at page 320, "A mandate is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue which was not expressly or impliedly disposed of on appeal." Many other authorities are to the same effect but it would be a matter of supererogation to cite them.

It does not appear to me at this time that the plaintiffs, in action No. 5678, should be burdened with any of the costs resulting from allowance of fees and costs to the Special Master in connection with carrying out order No. 388 and the order of this court of January 23, 1948 directing the turn-back and accounting. But, the plaintiffs in action No. 5678 joined in the motion for discovery and inspection of documents, (at last report approximately 44,000 were marked by the Special Master on the inspection hearings), and it seems to me that the plaintiffs in action No. 5678 should be made to bear a portion of such fees as part of the costs in compliance with the mandate.

The mandate clearly requires a judgment of dismissal of Civil Action No. 5678 but there are two steps in the judgment, one is the *making* of the judgment to be settled and approved as provided in Rule 58, Fed. Rules Civ. Proc. 28 U. S. C., and the other is the entry thereof. Rule 58 provides that the *entry* of judgment shall not be delayed for the taxing of costs. Whether or not a portion of the fees of the Special Master in connection with the discovery proceedings can be assessed as costs against the plaintiff in Civil Action No. 5678 is a question which none of the parties has seen fit to touch upon or to brief. Also, whether or not, if they are assessable as costs, it should be done before the making and the entry of the judgment of dismissal, they have likewise not seen fit to discuss or to brief or inform the court of their position whatever.

There has been paid out of funds on deposit in court a sum in the neighborhood of $10,000 as costs incurred by the Special Master on the two references to him for clerical help, court reporters, photostating, microfilming and the like. In addition to that the sum of $61,000 has been allowed and paid to the Special Master out of funds on deposit in court as fees on interim or partial allowances only. No final report of the Special Master on either the turn-back proceedings and accounting, or the discovery and inspection proceedings has been made or approved and in none of the orders for allowance of fees to the Special Master was there any determination or indication of a determination of the total amount of fees to be allowed or the total value of his services. There has likewise been no order of court allocating the fees and costs as charges against the various parties or any party to the action under Rule 53(a), F. R. C. P. which provides that "The compensation to be allowed to a master shall be *fixed by the court,* and *shall be charged upon such of the parties or* paid out of any fund or subject matter of the action, which is in the custody and control

of the court as the court may direct." The rule also permits execution to be issued for such fees.

While the fees and costs were paid out of funds on deposit in court the matter of who they would or should ultimately be charged against was not at any time settled. None of the funds on deposit in court were received from any of the plaintiffs in action No. 5678.

Regardless of what disposition is made with relation to the reference to the Special Master on the turn-back proceedings and the accounting thereon under the previous order of this court of January 23, 1948 and Order No. 388 of the Home Loan Bank Board, it seems clear to me that the reference to the Special Master for discovery and inspection should be wound up under the mandate and the decision in 12591, as promptly as possible by a final report of the Special Master and a hearing thereon and a final order fixing additional fees and costs, if any, and making an allocation of the charges under Rule 53 (a) therefor upon such of the parties to this action as may be liable therefor. This is particularly so in view of the holding of the appellate court as to the lack of jurisdiction of this court in action 5678 and the clear terms of the mandate to dismiss 5678 at the *costs of the plaintiffs.* This has been partially done by requiring counsel for plaintiffs in action 5678 to redeposit the $75,000 allowed them as fees.

The principal reason for the appointment of the Master was for the protection of the San Francisco Bank and its member Associations and its, and their, records.

It is conceivable that a portion of the Master's fees and costs could or should be assessed against the San Francisco Bank. See Associated Almond Growers v. Wymond, 9 Cir., 69 F. 2d 912. However, it is neither necessary nor appropriate to determine this issue at this time.

While the San Francisco Bank is entitled to have 5678 dismissed as promptly as possible there can be no injury come to the Bank or its security by postponing such dismissal until such time as the Master makes his final report and until such time as the matter of whether or not "according to right and justice and the laws of the United States, the said appeals notwithstanding," a portion of the costs and fees of the Special Master should or should not be assessed against and paid by the plaintiffs as specifically required by the mandate, or others in action No. 5678.

In the course of deliberation on this matter it occurred to me that action 5678 could be dismissed and that possibly any costs and fees which might be assessed against the plaintiffs in action 5678, because of the discovery and inspection proceedings, might be assessed in action 5421 because of the cross-complaint filed in that action by the Los Angeles Bank seeking practically, if not identically, the same relief sought originally by the complaint in action 5678. But recourse to the record (printed record page 564) discloses that the cross-claim in action 5421 was filed only by the Federal Home Loan Bank of Los Angeles and did not contain any allegations as a class action by the six so-called member associations as was included in the original complaint in 5678. The Los Angeles Bank, by the opinion in 12591, is now non-existent and according to that opinion has been non-existent since March 1946. Any judgment for costs in 5421 against the Los Angeles Bank alone would, therefore, be a futile and idle act, and it appears that it would certainly not be in compliance with the mandate or according to right and justice unless the contrary is shown at a hearing on that subject. Hence, costs, if a judgment for costs against the plaintiffs in 5678 results, can only be collected from the six so-called member associations who joined in 5678, but not in the cross-claim in 5421, as plaintiffs or possibly from all of the members of the class they represent.

Certainly the appellate court, in requiring the dismissal of 5678 at the "cost of plaintiffs," did not intend an idle and ineffective act, but intended that whatever the costs were they should be *paid* by plaintiffs in 5678. The procedure I am adopting thus appears to be the only means of effecting such payment and complying with the mandate, as a writ of execution for costs against the non-existent Los Angeles Bank would be wholly useless.

And I, therefore, deem it in strict compliance with the express terms of the mandate that such costs and fees be allocated and charged under Rule 53(a) so that at the time of dismissal the matter of the liability of the plaintiff in action 5678 for such share, if any, of the Master's fees and costs for the discovery proceedings may be settled and set forth by appropriate judgment or order.

The fees and costs of the Special Master do not appear to be included within those which might be settled by the Clerk under Section 1920 of Title 28 U. S. C. A. Such fees and costs must be fixed and assessed by the Court. Furthermore, Rule 54(d) permits the court to review any action by the Clerk. And it has been demonstrated upon many occasions in this lawsuit that any appellate review will not be lightly passed by any of the litigants.

A copy of this memorandum will be furnished the Special Master who will regard it as a direction to forthwith file a final report and account on the discovery proceedings and request for further fees and costs, if any, and notice the same for hearing.

Upon settlement thereof and the charging of costs thereon under Rule 53(a) against the litigants in the consolidated cases 5421 and 5678 the reference to the Special Master for the purposes of discovery and inspection will be formally terminated and the Master discharged in con-

nection with the discovery and inspection; an Order will then be made severing action 5678 from action 5421 and a judgment made of dismissal and for costs incurred against the plaintiffs in 5678 in accordance with the terms of the mandate.

Observations Concerning Construction of Mandate, Opinions of Appellate Court and Proposed Orders Nos. 1, 2, 3, 4 and 5.

Before proceeding to a discussion or decision of the other proposed orders and motions listed earlier in this memorandum, it is necessary to make some observations concerning the construction of the mandate and the opinions of the appellate court. As heretofore indicated, I deem it my duty to follow the mandate where it is specific, and to do such other things, "as in conformity with the opinions and judgments of the appellate court, as according to right and justice, and the laws of the United States ought to be done, the said appeals notwithstanding."

A great deal of time and care was obviously spent by the appellate court in the preparation of the long and detailed opinions. Obviously considerable care was exerted in connection with the preparation of the mandate. It is clear from the mandate and the opinion in 12591 (the attorneys' fees appeal), that the court held, and intended to hold, that no jurisdiction existed in this court to entertain civil action 5678 and that the entire action should be dismissed.

Counsel for the Home Loan Bank Board and the San Francisco Bank argued with more heat than illumination that certain occasional phrases in the opinion in 12511 (the injunction appeal) held there was lack of jurisdiction of action 5421. And basing their contention thereon, instead of on the whole opinion, contended that this court should dismiss action 5421 in its entirety. After a careful re-reading of both of the appellate court's op-

inions several times, as well as the mandate, I cannot agree with that contention.

As indicated, the opinion of the appellate court was carefully prepared and likewise the mandate. On the face of the mandate it becomes apparent that the appellate court intended a *different result in 5421* than they did in *5678* inasmuch as they used the plain language, "dismiss *civil action 5678*" and, "*dismiss* the *following pleadings* in civil action *5421.*" Had it intended to hold in 12511 that the District Court had no jurisdiction at all, as they did in their opinion on the appeal on the attorneys' fees, No. 12591, I must indulge the presumption that they would have plainly said to *dismiss* civil *action 5421* as they did say to dismiss civil action 5678 instead of directing this court to "dismiss the *following pleadings* in civil action 5421."

But clearly the court held that the Administrative Procedure Act applied to proceedings for the appointment or ousting of a conservator, an issue in action 5421. And clearly held that "such a final administrative determination would have been subject to a judicial review at the behest of Association," 196 F. 2d 375, and that the Administrative Procedure Act applied to pending cases 196 F. 2d at page 382. And specifically the court, by footnote 15, at page 379 of 196 F. 2d stated: "We express no opinion as to whether the lower court or a federal court in the District of Columbia would have had jurisdiction to review the final order or 'determination' of Administration."

Neither of the appeals were before the appellate court on the merits. *There has never been any administrative hearing either on the appointment of the conservator or on the rescinding of the order appointing him or on his accounting.* And the very order which was on appeal to the appellate court enjoined any such administrative hear-

ing, so such fact was well known to the appellate court in making its opinion. I cannot read the opinion of the appellate court in 12511 or the mandate as compelling any other conclusion that that action 5421 was *premature* and that was so because the parties had not exhausted their administrative remedies before the Home Loan Bank Board, and that after such an administrative hearing an action will lie *someplace*, either in this court or in the District of Columbia for judicial review in "one package" 196 F. 2d at page 390.

This conclusion is further fortified by the fact that the mandate is specific as to the dismissal of only *certain pleadings* out of the dozens which have been filed and were in the record on appeal and the vacation of only *two orders out of the hundreds* which were likewise in the printed record on appeal and which had been made and entered and involved and concerned interpleader and intervention actions by several hundred persons owning property and having loans from the Association, as well as many others. Had the appellate court intended a dismissal of action No. 5421 and to do otherwise than limit its mandate and its opinion, it would not have been so specific in connection with the terms of the mandate requiring the dismissal of the pleadings only.

Had the appellate court intended to dismiss action 5421 on the grounds of lack of jurisdiction, it would have been entirely unnecessary to have included all of the directions in the mandate which are carried in paragraph No. "2 a, b, c, d and e," paragraph No. "3", and paragraph No. "4"; all of those things would have been accomplished by a simple order directing this court to dismiss action 5421 as it did as to action No. 5678 and all of the things specifically designated in paragraphs 2, 3 and 4 would have occurred as of course.

Moreover, there were many orders made in the consolidated proceedings which were regarded by all parties

as *final* orders. Under the appellate court opinions this court must determine as to all of them whether such were, "ancillary," or whether "independent," grounds of jurisdiction existed. The appellate court obviously did not desire to disturb them, otherwise it either would have directed the dismissal of the action or the vacation of such orders. Reference to a few of such orders demonstrates the point.

Entirely apart from the interpleader of Title Service Company as owner under trust deeds of the legal title to many hundreds of parcels of land, persons owning the beneficial interest and purchasing over 400 separate parcels upon which residences either had been constructed, or were in course of construction, filed 51 interpleader-interventions and final orders were made thereon. While the attorneys for the San Francisco Bank refer to all interventions and interpleaders and the issues raised thereon, as "spurious," "specious," "blantantly specious" and like invectives, an appropriate judicial approach thereto will not permit them to be brushed off so easily.

The fact is, and has never been denied by anyone, that such owners were paying off loans on individual houses to the Long Beach Association which loans were secured by trust deeds upon their property under which trust deeds the legal title of each parcel was held by a third party as trustee; that the conservator then claimed the right to have payments on such loans made to him as conservator at the same time that the Long Beach Association, the Shareholders Protective Committee were claiming the conservator had no such right and that payments thereon should be made to the regularly elected officers of the Association; that such owners desired (as they were entitled to do), to pay their obligations on such notes and trust deeds in full and receive clear and merchantable titles to their property; and that if such owners paid to one

or the other of the contending factions they ran the risk of possible liability to whichever contending faction might ultimately prevail in either an administrative or judicial proceeding.

At the time of filing those interpleader-interventions, there was thus clearly an "independent" ground of jurisdiction under the interpleader statute, 28 U. S. C. §1335 (then 28 U. S. C. §41). Jurisdiction under the interpleader statute does not depend upon which of several claimants may ultimately be held to be right or wrong. The essence of it is that one holds money or property and that two or more claimants who are adverse to one another "are claiming or *may* claim to be entitled to such money or property, or to any one or more of the benefits * * * arising by virtue of any such obligation." The statute is thus very broad.

The validity of the appointment of the conservator had not then been, and it is contended by the Long Beach Association that it has not yet been, determined on the merits, either by administrative hearing or judicial proceedings in review thereof.

By the terms of order 2015, 14 F. R. D. 273-289, footnote 11, all of grounds originally asserted as the basis for the appointment of the conservator are reincorporated by reference to the more definite statement therefor of May 20, 1946, 14 F. R. D. 273 at page 280, footnote 4. And no hearing has yet been had on Order 2015 but the order of September 21, 1953, vacating the injunction of December 2, 1949, clears the way for such process to now begin.

During the pendency of the proceedings this court, from time to time, made orders on the above mentioned interpleader-interventions, which orders required the deposit of money in court by the property owners, the execution of simultaneous requests for reconveyance by the

conservator and by the Long Beach Association, and the execution of reconveyances by the Trustees holding legal title to the various properties. If such orders were not final orders, and if action 5421 were dismissed, then instead of such transactions being *fait accompli,* the parties who obeyed such orders would be in a position to claim that their acts in compliance with such orders might be vacated on the ground that they were not voluntary but were coerced by an invalid order. Such contention might appear to be far-fetched, but one cannot foresee in this litigation what contentions may be made by either the San Francisco Bank, the Home Loan Bank Board, the Association, or others and be ultimately right, One of the functions and duties of this court is to exercise its powers so as to avoid future litigation. If such contentions are made it will cause a cloud upon the title of the property owners who in this litigation are innocent third-parties and should be removed from the maelstrom of this litigation. As hereinafter appears, the Home Loan Bank Board, the official defendants and the Federal Savings & Loan Insurance Corporation, have filed pleadings after the turn-back order in January 1948, alleging that Ammann is still conservator, albeit their final and present position is somewhat confused by subsequent pleadings. Such orders must have been recognized by the appellate court as final orders, or it would have directed the vacation of such orders and not limited its mandate to the vacation of only two orders out of all that have been made, or it would have directed the dismissal of the action. On page 85 of the brief filed by the appellants in 12511 it is stated that such orders are regarded as final orders. If they were *final* orders then a dismissal of action 5421 would cut the ground out from under them, and lay the groundwork for further extensive litigation, which should and can be, and is avoided, by the terms of the mandate as I interpret it.

I therefore conclude that from the two opinions and the mandate that the appellate court did not intend that action 5421 should be dismissed.

Accordingly, I shall by separate and appropriate order dismiss the following pleadings in civil action 5421-PH:

(a) The complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;

(b) The cross-claim and third-party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party-complainant and cross-claimant;

(c) The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant;

(d) The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;

(e) The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant.

The order for dismissal as to Wallis will provide for the return to Wallis of the $50,000 cashiers check. While I felt that independent grounds of jurisdiction always existed as to the Wallis controversy, under the interpleader statute, I have no choice but to obey the mandate.

Order No. 8, *re* George Turner interpleader.

Proposed Order No. 8 is an order for the dismissal of the cross-claim and interpleader of George Turner. Obviously the appellate court considered this to be in a different category than Title Service and Wallis interpleaders as it was not specifically included in the mandate, although mentioned in the opinion. This complaint in interpleader was filed in the within action by reason of

the allegation that Ammann, the conservator, gave notice to Turner of the termination of a lease on property which the Association had leased to Turner. The Association and the shareholders were demanding that Turner pay the rentals in accordance with the terms of the lease, and, Turner claiming to be confronted by conflicting demands from the conservator that the lease was terminated, and the demands of the Association and the shareholders' committee that it was not, deposited in court the rentals accrued and continued to do so, during the period of the conservatorship. As heretofore appears by Order No. 388, and by Order of this court made on the 23d day of January, 1948, the Association was returned to its officers and directors.

If that were all there were to it and if, as government counsel contended in their brief on appeal in 12511 (pp. 34-35 thereof and footnote 4) that the order of January 23, 1948, terminating the conservatorship and directing the return of the Association was a, *"final order* and no appeal having been filed within the time allowed, the *propriety thereof is no longer open for consideration,"* it would be a simple matter and would require the dismissal of the Turner interpleader as there would then be no dispute or controversy between two contending factions, with Turner being caught in the middle. But such is not the case as shall presently appear. The Board of Trustees for the Federal Savings and Loan Insurance Corporation are the members of the Federal Home Loan Bank Board. Thus the same persons who are members of the Home Loan Bank Board act in a dual capacity as members of the Home Loan Bank Board and as trustees of the Federal Savings and Loan Insurance Corporation. Title 12 U. S. C. A. §1725. The Federal Savings and Loan Insurance Corporation has filed various pleadings in which it is asserted in varying ways that A. V. Ammann, in spite of the Order No. 388 of the Home Loan Bank

Board rescinding the appointment of Ammann as conservator and directing the return of the Association, is and always has been, *and continues to be, the conservator for said Association.* Typical of such allegations is the following, taken from the *Answer* of the Federal Savings and Loan Insurance Corporation to Amended Cross-Claim and Supplemental *Cross-Claim* of *Long Beach Federal Savings and Loan Association dated July 18, 1949,* wherein it is alleged *inter alia* (printed record page 7030), "This defendant further states that said A. V. Ammann has continued to be, and is now, the proper and duly designated conservator for said Association * * *."

This allegation is adopted not only by the Federal Savings and Loan Insurance Corporation but by the Home Loan Bank Board and all of the official defendants in their *"Answer* to the Second Supplemental *Cross-Claim* of the *Long Beach Federal Savings and Loan Association* upon the Conservator's Bond and against the Federal Savings and Loan Insurance Corporation" by the following allegation (printed record page 7061):

"These defendants incorporate all of the denials and statements made in their answer to the Amended Cross-Claim and Supplemental Cross-Claim of the Long Beach Federal Savings and Loan Association, and in their answer to the First, Second and Third causes of cross-claim." That answer was likewise dated and filed July 18, 1949.

The situation is further confused by an *answer* filed November 14, 1949, by the Federal Savings and Loan Insurance Corp. to the second supplement to *cross-claim* in interpleader of *George Turner* and to said cross-claim in interpleader and supplement thereto (printed record pages 8161 and 8163) wherein it realleges the defenses, answers and allegation in the previous answer filed to the various pleadings of the Long Beach Federal Savings and

Loan Association "except that this defendant admits that the legal conclusion alleged in said answer that defendant A. V. Ammann has been conservator for the Association since January 24, 1948 is erroneous and admits that the order of this court of January 23, 1948 to the extent that said order purported to remove said Ammann as conservator and restore the operations of said association to its former management, became final on execution thereof."

And an answer filed the same date by the defendants Home Loan Bank Board, its members and the other official defendants to the Turner cross-claim in interpleader and supplements thereof, (printed record page 8163) "that on January 24, 1948 the defendant Ammann was removed as conservator by order of this court, which order insofar as it purported to remove the defendant Ammann, to restore the operations of said Association to its former management was finally executed and became final on January 24, 1948; and that after the time for appeal from said order expired, neither the defendant Ammann nor any of these defendants, has ever asserted and does not now assert, any claim either on behalf of themselves or the defendant Association to said leasehold or to any rentals accruing thereunder."

The latter allegations in answer to Turner's interpleader are contrary to the allegation in the answers of said Federal Savings and Loan Insurance Corp., the Board, and the official defendants, to the pleadings of the Long Beach Association, hereinabove quoted, and no amendment has ever been made to the latter mentioned answers. So that there is in one set of pleadings an assertion that Ammann always has been and still is the conservator, and in another set the contrary appears. The Federal Savings and Loan Insurance Corporation, the Board and the official defendants are thus like the pro-

verbial cat which stays in a position to jump both ways, and which way they are going to jump cannot be seen until at least after an administrative hearing on Order No. 2015, as shall presently appear. One of the grounds for the appointment of Ammann, as contained in the More Definite Statement of Causes dated May 29, 1946, full text see 14 F. R. D. 273 at page 280, footnote 4, is that "(i) on or about May 8, 1946 the said Association through its officers, executed a purported lease on a hotel property located at 322 American Avenue, Long Beach, California, owned by it, to one George Turner for a twenty-year period on terms, which, in effect, would give to the said Turner the use of said property without adequate consideration therefor to said Association." While the hearing on that order was indefinitely postponed in November 1947 and the Board made its order No. 388 on January 17, 1948, rescinding the appointment of Ammann and directing the return of the Association from the conservator, the Home Loan Bank Board nevertheless, on September 9, 1949, by its order No. 2015 set another administrative hearing (this is the order, hearing upon which was enjoined by the order of December 2, 1949 resulting in appeal 12511) and reincorporated all of the asserted violations set out in the More Definite Statement of May 29, 1946, including the assertion hereinbefore quoted as paragraph (i) of said More Definite Statement of May 29, 1946.

As indicated, the Home Loan Bank Board is now free to go ahead with the administrative hearing originally ordered by its order No. 2015 in which the attack upon the Turner lease is made, by charging it as an act of mismanagement by the officers of the Association. Thus the only conclusion which can be reached from the rather confusing allegations contained in the various answers to the Turner interpleaders and from order 2015, is that Turner is still confronted with the assertion of

invalidity of his lease on the part of the Home Loan Bank Board during the period of the conservatorship, if not afterward. It may well be that at the administrative hearing which is now free to be had by the Home Loan Bank Board on its order 2015, said assertion will be abandoned or the Board may disapprove that allegation. In that event Turner, of course, would have no cause of action in interpleader. It is not intended to suggest that the Board has any plenary jurisdiction to determine the validity or invalidity of the Turner lease.

It seems to me that in view of the fact that there was no specific direction in the mandate for the dismissal of the Turner cross-claims which were before the appellate court, and in view of my construction of the opinion in 12511 that the administrative procedure must be first exhausted before any judicial review can be had anywhere, that this court should not now make any order disposing of the Turner interpleader. If the parties involved, *i. e.*, Turner, the Association, the Home Loan Bank Board, or Ammann (if he still claims to be conservator) desire disposition of the Turner matter at anytime, such party may by appropriate motion bring the matter on for hearing. In the meantime the Turner interpleader can remain in *status quo*, to the injury of no one.

Proposed Order No. 9—the Cross-Claim of Hegg.

Proposed Order No. 9 orders the dismissal of the cross-claim of Roy E. Hegg, filed July 30, 1948 (printed record page 4725 at 4760). From the cross-claim which accompanied an answer filed by Hegg, it appears that he was a director of the Federal Home Loan Bank of San Francisco and severed himself from the other defendants, answering separately and cross-claimed for declaratory relief as to the conflicting claims of the Los Angeles Bank, the Portland Bank, and the San Francisco Bank.

Mr. NeCasek, counsel for Hegg, stated during the argument that Hegg had died April 24, 1953, which fact was stipulated to by all parties present. An examination of his pleading indicates that his action was purely a personal one insofar as the cross-claim was concerned, and it is, therefore, unnecessary to await the statutory period for substitution of the executor or administrator of his estate.

Furthermore, the allegations of his cross-claim and the prayer thereon for declaratory relief are answered by the opinion of the appellate court on the attorneys' fees proceeding, No. 12591, in holding that this court had no jurisdiction to entertain an action concerning the establishment of the San Francisco Bank. The Hegg cross-claim will, therefore, be dismissed by appropriate order.

Proposed Order No. 10, *re* Willhoit Intervention.

Proposed Order No. 10 relates to the dismissal of the complaint in intervention of John D. Willhoit, filed October 27, 1952 after the appellate court had filed its opinion in 12511 on April 2, 1952, and before the appellate court filed its opinion on the attorneys' fees in 12591 on November 2, 1952, and before any applications for certiorari or action thereon by the Supreme Court and before the Order of Stay of Proceedings, made by the appellate court on November 13, 1952. Willhoit's claim for relief is an unusual one (as so many things are in connection with this case), in that he asserts that certain original records of his were in the possession of the Long Beach Association on the day the conservator took possession of the Association, and that the conservator took possession of his original books and records and that he has since been unable to find them, although on the filing of his motion approximately one million dollars worth of cancelled checks of the Association, were produced in court by the U. S. Attorney, the possession of

which had theretofore been denied by the conservator. It is asserted by Willhoit that the production of his original records is necessary for him to use in connection with an income tax investigation.

As heretofore indicated, the stay was terminated by the coming down of the mandate in 12511 and 12591. But an examination of Willhoit's complaint indicates that his claim for relief really has to do with the accounting ordered to be made by the conservator by order No. 388 of the Home Loan Bank Board and by the order of this court of July 23, 1948. So that whatever is done in this case with relation to Willhoit's complaint must stand or fall by whatever is done with relation to the accounting of the conservator. It is unnecessary to now determine whether or not Willhoit would have an independent cause of action for damages against Ammann personally as bailee.

Proposed Order No. 11 Concerning the Turn-back Order of Jan. 23, 1948.

Turning now to proposed order No. 11, and the motion thereon, which asks this court to vacate the order of January 23, 1948 and the order of reference to the Special Master concerning the turn-back proceedings and an interim order concerning accounting of the conservator dated February 10, 1950:

As heretofore indicated it is my conclusion that a claim for relief in connection with either the appointment of the conservator, his conduct while conservator, or his accounting, cannot be judicially reviewed until after the conclusion of administrative hearings. During the course of the hearing beginning October 12, 1953 the court endeavored several times to secure from Mr. Silverman (Associate General Counsel for the Home Loan Bank Board, and appearing for it and the official defendants by special order of this court), a reference to any

provision of the Code of Federal Regulations which provided for an administrative hearing on the accounting. I regret to say that Mr. Silverman was anything but helpful in that connection as he referred me to Title 24 C. F. R. §147.9(a) which requires the filing with the Home Loan Bank Board of a detailed report, and to Title 24 C. F. R. §107.10 as the provision which would permit administrative hearing by the Home Loan Bank Board on the accounting of a conservator. But an examination of §107.10 reveals that it covers only the matter of hearings on regulations or proposed amendments thereto. The failure of Mr. Silverman to aid the court is in part reflected by the following colloquy which occurred on October 24, 1953 at page 763 of the transcript:

"Miss Martin: Your Honor, I would like to repeat what I said, which was that he was to account for what he got and what he did with it and he has accounted for the fact that $7,300,000 came by reason of his execution of a note.

"The Court: That would be the end of the accounting if he just said, well, I got $500,000 and I threw it down the rat-hole? Nobody could say anything about it?

"Mr. Silverman: I don't think anyone could.

"The Court: You do not think anyone could?

"Mr. Silverman: No, sir."

An independent examination of the regulations which time did not permit during the course of the argument, discloses however, that there is an administrative procedure for the hearing of the accounting of a conservator before the Board. It is contained in Title 24 C. F. R. §149.9(b) [formerly 417.9 and prior to that 207.9]. The full text of 24 C. F. R. 149.9 reads as follows:

"§147.9. *Final discharge and release of conservator*— (a) Final report. At such time as the conservator be

relieved of his duties the conservator shall file with the Home Loan Bank Board a detailed report in form satisfactory to the Home Loan Bank Board.

"(b) *Final discharge.* Unless otherwise directed by the Home Loan Bank Board, upon the completion of the duties of the conservator or at such time as the conservator shall be otherwise relieved of his duties, an examination and audit may be directed by the Home Loan Bank Board in connection with the report of the conservator hereinbefore required. The *accounts of the conservator shall be approved or disapproved, and, if approved, the conservator shall thereupon be given a complete and final discharge and release.*" (Italics supplied.)

The matter of the accounting has presented many considerable problems. The text of order No. 388 does not *terminate* the conservatorship or discharge him (24 C. F. R. §146.4) but *rescinds* Order 5254, which appointed the the conservator, and directed the conservator to make a full and complete accounting to said shareholders for all assets and liabilities of any and every nature pertaining to said Association, and a copy of said accounting to be filed with the District Court of the United States in and for the Southern District of California; and, the conservator was directed by Order No. 388 to make available for inspection all records and books of the Association to counsel for the shareholders' committee or an agent of the shareholders' Association, or to a representative of the District Court of the United States in and for the Southern District of California, and further directed that a certified copy of that resolution should be forthwith delivered to the above named court and filed in the above numbered actions 5421 and 5678. It was upon that order, where the United States Attorney, as well as a Mr. McKenna, one of the attorneys for the Home Loan Bank Board, appeared and consented to the making of the order by this court on January 23, 1948, for turn-back

and the appointment of the Master and accounting. Not only did they consent but joined in the request and suggested names of persons. It was at the court's suggestion that Mr. Walker, then Assistant United States Attorney who had been handling the litigation, was appointed because of his familiarity with the whole case. No point has ever been made to this court by the official defendants or the Home Loan Bank Board that an administrative hearing was required on the accounting of the conservator before any legal action could be filed. In fact, it was upon the suggestion of the court that the Attorney General's Office secured the services of accountants from the F.B.I. to complete the accounting which the conservator had filed but which obviously was not a complete accounting.

Again I must advert to the fact that the mandate being specific as to the vacation of certain orders, did not include any orders directing the vacation of the order either for the return of the Association or for the accounting of the conservator. Doubtless the appellate court was influenced in this connection by the statements hereinbefore adverted to on pages 34 and 35 of the brief of the Home Loan Bank Board in 12511 to the effect that the order of this court of January 23, 1948 was final and that the propriety thereof was no longer open for consideration, although it might be regarded from the footnote No. 4 on page 35 of that brief that the contention was made that the accounting was a separate controversy. Furthermore, the court was no doubt influenced in this connection by the allegation by the official defendants speaking as the Home Loan Bank Board and as the Federal Savings and Loan Insurance Corporation in the pleadings heretofore adverted to, to the effect that the order of this court of July 23, 1948 restoring the Association to its officers in accordance with the Home Loan Bank Board Order 388 was final. In any event, had the appellate court intended

such order as proposed by the appellants in their proposed order No. 11, it could, and would have been as specific with relation to it as it was to the orders included in its mandate. In any event, the way is now open for the Home Loan Bank Board to have an administrative hearing on the accounting of the conservator which from the opinion of the appellate court in 12511 will be judicially reviewable at the conclusion of such administrative hearing by some court. And while the appellate court did not indicate that this court would or would not have jurisdiction of such a judicial review, and it is not necessary at this time for this court to make such a determination until, and if, the question comes before it in an orderly manner after the administrative hearing, it nevertheless seems to me that it is in compliance with the opinion of the appellate court and the terms of the mandate and in accordance with right and justice that the turn-back order of January 23, 1948, and the various orders concerning the accounting, all of which were incidental and subsequent to the turn-back orders, should not now be vacated. Furthermore, I deem it inappropriate that the Master should proceed with further hearings on the accounting until at least after the conclusion of the administrative hearings thereon and on Order 2015. In the event any action is required or desired in the meanwhile, any party may by appropriate motion bring the matter on for hearing. No one can be harmed in the meanwhile by such procedure, and whatever rights, if any, of anybody can thus be preserved.

Proposed Order No. 12, *re* Discovery.

Order No. 12 as proposed by the appellants directs the vacating of the order of discovery and inspection, but what has heretofore been said in connection with the dismissal of 5678 and the final report of the Master, disposes of that proposed order and in my judgment it should not now be made for the reasons hereinabove indicated.

Proposed Order No. 13, *re* Bellflower Interpleader.

Order No. 13 proposed by the appellants is an order denying the petition and supplement thereto to interplead or deposit in court disputed stock subscription of First Federal Savings and Loan Association of Bellflower, California. I do not think that such an order is appropriate on the mandate but that the question should be raised by the appropriate motions to dismiss and Order No. 13 as proposed by the appellants will be declined at this time.

Proposed Order No. 6 *re* Return of Security to San Francisco Bank.

That leaves for disposition order No. 6 as proposed by the appellants, which is asserted by them to be in compliance with paragraph 3 of the mandate. The consideration and disposition thereof has been reserved until the last of the 14 proposed orders for the reason that it, more than the others, involves issues and things which are, or are asserted to be, involved in the many motions made in case No. 13979.

Before considering the contentions of the parties with relation thereto, it will be necessary, as briefly as possible, to advert to other facts and proceedings heretofore had. The conservator went into possession of the Long Beach Association on May 20, 1946. He released possession on January 24, 1948 pursuant to the orders heretofore mentioned of the Home Loan Bank Board No. 388 and of this court of January 23, 1948. During the time the conservator was in possession he secured from the San Francisco Bank in the neighborhood of $7,000,000, executed promissory notes therefor to the San Francisco Bank, and placed with the San Francisco Bank as security on said notes, U. S. government bonds in the face value of $5,300,000 and several million dollars face value of individual-borrowers' notes and deeds of trust securing the same, which notes and deeds of trust had been executed

by persons borrowing money from the Long Beach Federal Savings and Loan Association. So that at the time of the order of March 13, 1948, hereinafter referred to, there were in existence notes executed by the conservator in favor of the San Francisco Bank as payee in the face principal amount of $6,300,000. These notes are the subject matter of action 13979 and will hereinafter be referred to merely for convenience sake and for purposes of identification only as the "conservator's notes." There was in the possession of the San Francisco Bank as of the date of the turn-over order of March 13, 1948 claimed by it to be held as security for the payment of the conservator's notes, U. S. government bonds in the face amount of $5,300,000 with attached coupons for accrued and accruing interest thereon, individual borrowers' notes totaling several million dollars, payable to the Long Beach Federal Savings and Loan Association, secured by deeds of trust endorsed by the conservator to the San Francisco Bank in the face amount of several millions of dollars. For convenience sake and for purposes of identification only and to distinguish them from the conservator's notes, these notes and trust deeds securing the same will be referred to in this Memorandum as the "individual borrowers' notes." There were several thousand of these individual borrowers' notes and each of them are listed and identified in the order of March 13, 1948 by giving the loan number, the original amount, the date of execution, the trustor (that is, the borrower), the trustee (holding legal title to the property) and the recording data. The list can be found in the printed transcript of record on appeal in 12511 at pages 8423 to 8518 inclusive.

In addition to the foregoing the Long Beach Association held stock in the San Francisco Bank issued to the Long Beach Federal Savings and Loan Association in the face value of several hundred thousand dollars. By statute this stock is security for any indebtedness of the

Long Beach Association to the San Francisco Bank. There had previously been brought into court a sum in excess of one and one-half million dollars by approximately 51 individual interpleader-intervention proceedings wherein, in each of them, the individual borrower from Long Beach Federal Savings and Loan Association desired to pay the balance of his notes in full and secure reconveyance of his property, the legal title of which was held by a trustee as security. Four hundred and eighty parcels of land were involved in these individual interpleader interventions and the complete list of them may be found in footnote 15, 14 F. R. D. 273, at page 306.

The Home Investment Co. was one of the individual borrowers filing such an interpleader-intervention proceeding in which was involved 174 separate parcels of land and the total amount deposited by the Home Investment Co. in that interpleader-intervention was in excess of $700,000. (The Home Investment Co. is one of the movants for summary judgment in 13979).

On March 13, 1948 the court made its order directing that the conservator's notes, together with all collateral, including the stock in the San Francisco Bank held by the San Francisco Bank as security or claimed security therefor, which collateral is above described, be deposited in this court. And, on March 26, 1948, after hearing, this court made an order directing that the individual borrowers' notes and trust deeds thereon be returned to the Long Beach Association and that whatever lien thereon which might exist in favor of the San Francisco Bank would be transferred to the government bonds, their coupons and the money theretofore deposited in court as a result of the 51 interpleader-interventions above mentioned.

The interlocking of the matters which must be given consideration in connection with compliance with Par-

agraph 3 of the mandate and with the matters and things involved in case No. 13979, arises principally because of two things, which may be more or less summarily stated as follows: (1) the contention of the Long Beach Association that this court can, in compliance with the mandate, and must under applicable law, retain the money and securities referred to in Paragraph 3 of the mandate and now on deposit in 5421, in the registry of the court, but transfer the same to action 13979, for the reason that Long Beach Association has filed an answer to the complaint of the San Francisco Bank in 13979, denying the indebtedness, and the validity of the notes, and asserting affirmative relief and stating in its answer and cross-claim that it re-interpleads into court in action 13979 all of the bonds, securities and money now on deposit in the registry of the court in 5421 and belonging to Long Beach Federal Savings and Loan Association; and, (2), the allegation contained in the complaint of the San Francisco Bank in paragraph VIII of its Fifth Cause of Action to the effect that all of the United States Government bonds, and all the individual borrowers' notes and deeds of trust on real property securing the same were assigned, delivered and pledged to the San Francisco Bank as security for the notes now in the principal sum of $6,300,000, which are the subject matter of action 13979 and "that by reason of said assignments and pledges said plaintiff (*i. e.*, the San Francisco Bank) became, ever since has been, *and still is,* the owner and holder of a lien upon all said pledged and assigned property;" and the further allegation contained in paragraph 15 of the complaint of the San Francisco Bank in its Fifth Cause of Action to the effect that Long Beach Association is estopped from denying that plaintiff *"is the holder of a lien upon all of the personal property pledged to plaintiff, or any substituted collateral."*

The complaint of the San Francisco Bank in No. 13979 thus appears to be a complaint to foreclose a lien upon the United States Bonds and all of the individual borrowers' notes and trust deeds securing them (about 6,000 separate trust deeds and notes) which were ordered deposited in court by this court's order of March 13, 1948 and which were thereafter, by an order of this court on the 26th day of March, 1948, delivered to the Long Beach Association. After the return to the Association of the individual borrowers' notes and trust deeds, the Association continued to accept payments thereon, and according to documents on file about 1700 of them have been paid in full and title re-conveyed.

Under the order of March 13, 1948 directing the deposit of collateral in court there was deposited in this court U. S. Government bonds of the face value of $5,300,000 belonging to the Long Beach Association and several thousand borrowers' notes, the payee of each of which was the Long Beach Federal Savings and Loan Association, with the trust deeds securing each of them, transferring the legal title to the property covered to a third party as trustee. All these had been transferred by Ammann as conservator to the San Francisco Bank as security for loans made to Ammann while conservator of the Long Beach Association. Whether the allegations above mentioned contained in the complaint of the San Francisco Bank in 13979 precipitated them or not, the fact nevertheless remains that Home Investment Co. which, as owner of 174 separate parcels of property, had interpleaded cash in excess of $700,000 in action 5421 due on notes secured by trust deeds on the 174 parcels of property, and the Title Service Co., holder of the legal title as trustee under deeds of trust securing many of the notes involved in 50 other interpleaders similar to Home Investment Co., and holding the legal title as Trustee to several thousand other parcels of property deposited in

court, joined in a cross-complaint in inter-pleader in 13979 as did also the Long Beach Federal Savings and Loan Association. All of them, that is to say, Home Investment Co., Title Service Company and Long Beach Federal Savings and Loan Association, have filed a motion in 13979 which was heard beginning October 12th along with all of the other motions, for a summary judgment quieting title to all of the property covered by such trust deeds and to such trust deeds and notes executed by individual borrowers from Long Beach Association as against the San Francisco Bank, and as against other persons named as cross-defendants in the various cross-claims filed in action 13979.

By the order of March 26, 1948, returning the trust deeds and notes to Long Beach and transferring to the cash and bonds in court whatever lien existed in favor of the San Francisco Bank on the conservator's notes which are now the subject of suit No. 13979, the court, instead of attempting to judicially run the business of the Long Beach Association, turned over to it the matter of collection and servicing of the several thousand notes and trust deeds, but preserved, or attempted to preserve the rights of the litigants for ultimate judicial determination.

Paragraph No. 3 of the mandate requires two things: (1) that the order of March 13, 1948 requiring the deposit in court of the conservator's notes, the government bonds and trust deeds with their accompanying individual borrowers' notes, be dissolved, set aside, and vacated, and (2) the return to the Federal Home Loan Bank of San Francisco of the conservator's notes principal aggregate face amount of $6,300,000, together with the substituted collateral made under the order of March 26, 1948.

If an order is made in compliance with the first provision of paragraph 3 of the mandate directing the vacation of the order for deposit in court of March 13, 1948,

then by such vacation the status quo ante will automatically be restored. That is to say, whatever rights the San Francisco Bank had (and it is not disputed that they had possession of the individual borrowers' notes and trust deeds securing same), would be restored as of the time of making the order of March 13, 1948. And the San Francisco Bank, by the pleadings above quoted is insisting upon its rights to foreclose on such trust deeds and individual borrowers' notes even though, as counsel all admit, many of them have been paid off.

As heretofore indicated, it is shown in many pleadings and not denied, that each of the individual borrowers' notes and trust deeds on the several thousand parcels of property owed by debtors to the Long Beach Association were transferred and assigned by the conservator to the San Francisco Bank and were in its possession. The presumption is that the conservator had the authority to make such assignments and that such assignments were legal and valid. On the hearing on the motions for summary judgments in 13979 approximately 1700 trust deeds and their accompanying notes which had been deposited in court by the San Francisco Bank pursuant to the order of March 13, 1948, had been paid off in full and were produced in court. The re-transfer of said notes and trust deeds from the San Francisco Bank to the Long Beach Federal Savings and Loan Association on each document recited that the transfer was made *pursuant to court order*. If, therefore, the court order is vacated, dissolved and set aside without some disposition of the questions concerning the several thousand trust deeds and notes, a question arises as to the legality and efficacy of the transfer of the notes and trust deeds made by the San Francisco Bank to Long Beach Association under the order of March 26, 1953.

The resulting situation is not a mere chimera, or a figment of the imagination, or a false or spurious issue,

but presents a very real problem insofar as the trustees under said paid-off deeds of trust are concerned, and insofar as the payees on those individual borrowers' notes are concerned. The same problems are present insofar as each of the several thousand individual-borrower notes and trust deeds, which are not yet paid off, are concerned. The problem could very easily have been solved: and the suggestion was made repeatedly by this court to counsel, that if, as the San Francisco Bank stated in its brief to the Supreme Court on petitions for rehearing, and as counsel for the Bank stated in court in these proceedings and on previous ones, it actually claimed no right to have recourse against either the trustees under said trust deeds or the individual-borrowers, it could amend its complaint in 13979 or consent to a motion for a summary judgment, or file a disclaimer or other appropriate document, quitclaiming or otherwise indicating a disclaimer to any such right. A statement was made to that effect by counsel for the San Francisco Bank in the hearings before this court on the motions to spread the mandate covering the period May 25, June 22, June 24, and August 3, 1953. But upon argument in the appellate court on the appeals involving the Master's fees and the appointment of a Receiver, Mr. Angell, counsel for the San Francisco Bank, on August 6, 1953, stated: "It is the position of the San Francisco Bank that they are entitled to have full security for their $6,300,000 plus all interest due thereon *exactly as they had it at the time the money and bonds and deeds of trust were taken from the possession of the San Francisco Bank and placed in the registry of the court.*" which appeared to me to be at variance with statements made by Mr. Angell to this court previously.

Accordingly, on October 12th, at the commencement of the arguments on the various motions, I called attention to Mr. Angell's statement in the appellate court and its apparent discrepancy with statements previously made to this court, whereupon the following occurred: [Tr. p. 15].

"Mr. Chapman: That being one of the issues in case for Long Beach Federal at least, we seek to enf the decree that you made cancelling the endorsemen all these notes and quieting our titles as benefici under the trust deeds and Title Service—speaking for M Sutter who is absent—seeks to quiet its titles as tru under the trust deeds.

"In other words, for five years we relied on ord that you made as a result of which some $14,000,000 in bonds and money and notes, trust deeds, were deposite here. No appeal was ever taken from those order On an appeal from a previous injunction several years later the Court of Appeals makes some opinions and San Francisco Bank had its foreclosure complaint with declaratory relief count, or whatever you call that last count.

"The Court: What I am getting at is this, the statement was made here by Mr. Angell and by Mr. Hoffmann, and I think also by Mr. Dusenbery, on various or several occasions to the effect that the San Francisco Bank was not looking to any of the trust deeds that went through this court, either in special separate proceedings eventuating in a judgment or order of the court or that came in in the block of trust deeds made pursuant to the order of the court requiring the deposit in court.

"Now if that is the case I think something should be done by the San Francisco Bank to eliminate it rather than to try and bargain with this court that upon making an order which is satisfactory to the San Francisco Bank they will then execute quit claims.

"Counsel have furnished me, both Mr. Angell and Mr. Chapman, copies of the transcript before the Circuit Court of Appeals. In reading Mr. Angell's statement there, I am not sure but it seems to me to be at variance with the statement which you made here:

" 'It is the position of the San Francisco Bank that they are entitled to have full security for their $6,300,000, plus

ll interest due thereon, exactly as they had it at the time the money and the bonds and the notes and deeds of trust were taken from the possession of the San Francisco Bank and placed in the registry of the court. And when the order was made by the District Judge releasing those notes and deeds of trust which were far in excess of the amount of cash that was put in there, in fact, then we had a right, whenever this was determined—that the court had no jurisdiction—to fasten upon any funds of Long Beach Association in the registry of the court, either that court or this court, had a right to and must fasten upon those funds a lien sufficient to adequately secure the San Francisco Bank.'

"I do not think the last part of your statement is inconsistent with any statement which you have made here, but the previous portion of the statement, that you are entitled to have it exactly as you had it at the time the money and bonds and notes and deeds of trust were taken from the possession of the San Francisco Bank, that appears to me not to be consistent with the disclaimer which you made.

"Now perhaps I misread this statement here or misunderstood you when you made your statement to this court.

"Mr. Angell: Whichever be the situation, your Honor, I intended to say there—and I think I said it—that I was speaking of the amount and was not referring in any way to the notes and the deeds of trust which are referred to here and which were released from the registry of the court. The bond, the deposit of cash, it is quite obvious, I think, taking the whole thing in its context and reading the second with the first, that that exactly means an amount, that our security should not be impaired.

"The Court: Your position is, if I may paraphrase it and if I understand it as you stated it here, that the security you are looking to is solely the security on deposit in this court now.

"Mr. Angell: Quite right, your Honor.

"The Court: And not to anything which has been here and gone.

"Mr. Angell: Our position has never been any different."

However, the position of the San Francisco Bank was further confused by a subsequent contrary statement made by Mr. Angell during the course of the argument on October 21, as follows, (pages 757, 758): "We have filed a very simple action. That is what we conceive the San Francisco Bank rights to be. *We stand on it.* * * * *We state we stand on our complaint as it is filed* and we further say this court has no jurisdiction."

If the San Francisco Bank stands on its complaint as it is filed, which includes a cause of action to foreclose and reestablish its position as security holder as of the date of the turn-over on March 13, 1948, then there can be no doubt in my mind that the trustees holding legal title to the individual-borrowers' properties under the trust deeds which have been paid off and are now being paid off to the Long Beach Association, as well as the debtors on the individual notes securing those trust deeds, may be confronted with a very serious and complicated situation which might require extensive and expensive litigation on their part. It is simple logic that if the San Francisco Bank secured the title by assignment from the conservator of the trust deeds and notes, and if the order of March 13, 1948 is vacated, dissolved and set aside, then the San Francisco Bank, having assigned the notes and trust deeds, not outright *but only conditionally, pursuant to the order of March 13, 1948,* will be in a position to claim that all reconveyances made by the trustees holding legal title of the properties under the trust deeds, after March 13, 1948, were void and may look, or attempt to look, to such trustees for satisfaction of any judgment obtained in 13979 for the value of the property as of the time of the turn-over order on March 13, 1948.

Likewise, the San Francisco Bank may claim that the debtors on the notes securing those trust deeds, in view of the fact that they were claimed to be, (and it must be presumed that they were validly assigned to the San Francisco Bank) had no right to make payments thereon to the Long Beach Federal Savings and Loan Association but should have made payments thereon to the San Francisco Bank notwithstanding an agreement asserted by the San Francisco Bank to exist which was entered into prior to the appointment of the conservator authorizing the Long Beach Association to be its agent in the collection of balances due on notes. This is particularly so because of the confusing and contradictory statements in various pleadings as well as statements of counsel hereinbefore referred to.

It must be remembered in this connection that the San Francisco Bank, by its formal pleadings and by the last authoritative statement of its counsel in court, are asserting that the Order of March 13, 1948 was void and that they stand on their complaint as it is filed which seeks to restore the status quo as to all securities including individual-borrower notes and trust deeds as of March 13, 1948.

The two main contestants in action 13979 are the San Francisco Bank and the Long Beach Association, and the people who would be involved, or whose rights might be endangered by restoring the status quo as of March 13, 1948, are innocent third parties, that is to say, individual property owners who interpleaded in the 51 interpleader-proceedings in the consolidated actions 5421 and 5678, the debtors on the trust deeds and notes, and the trustees under the trust deeds holding legal title.

It therefore seems to me that in view of the fact that the mandate ordered the dissolution, vacation and setting aside of the order of March 13, 1948, requiring the deposit of the collateral in court, but *did not order the dis-*

solution, vacation or setting aside of the order of March 26, 1948, substituting collateral and directing the return to the Association of the notes and trust deeds securing them, that it was the intention of the appellate court to accept the substitution of collateral and that all questions concerning the borrowers' notes and trust deeds should be eliminated from litigation. This can be done, by the execution and appropriate filing of disclaimers or quitclaims by San Francisco Bank. The San Francisco Bank having indicated at one time or another its willingness to file a disclaimer, it seems to me that it is incumbent upon this court to provide for the elimination of all of those issues and controversies in the consolidated cases and in 13979 by an appropriate order in connection with carrying out the mandate insofar as paragraph 3 of it is concerned. This can be done by making the order required by the mandate and conditioning it upon the execution of appropriate disclaimers or quitclaims. Such disclaimers or quitclaims should release the individual borrowers on the notes and the Trustees on the notes that have been paid on and those that have been paid off since the order of March 26, 1946, as well as the individual-borrowers for all payments made to Long Beach Association since March 26, 1946, and should not release or affect in the slightest whatever liability Long Beach Association has to the San Francisco Bank. Thus there will, in my judgment, be *strict compliance with the mandate* and certainly compliance according to right and justice, as it will eliminate all innocent third parties and their properties from the nutcracker between the contesting litigants, San Francisco Bank and Long Beach Federal Savings and Loan Association.

Before considering the contention of the Long Beach Association that it is the duty of this court to transfer all securities and money on deposit in the registry of this court in the consolidated cases to action 13979, it is well to examine the audit and determine how much money

there is, and, insofar as necessary to comply with the mandate, also determine to whom it belongs. The audit shows the following as of August 3, 1953.

Received from individual-borrower interpleader-interventions:		
1. Principal and interest	1,631,406.70	
2. Penalties and impounds	557.26	
3. Reconveyance fees to trustees on on individual-borrowers' notes	747.50	
4. "Federal Housing Administration Bonus"	8,329.00	
Total cash from individual-borrowers		1,641,040.46
Interpleaders, cash, other than trust deed transactions:		
1. George Turner	18,503.52	
2. Bellflower	38,300.00	
3. Long Beach Federal Insurance premiums	123,026.33	
sub-total	179,829.85	
Total cash interpleaded		1,820,870.31
Paid out under order of court as fees, etc.,		344,945.04
Balance cash in court from interpleaders (not taking into account 50,000 cashiers check interpleaded by Wallis)		1,475,925.27
Cash represented by accumulated interest coupons to Aug. 3, 1953 on $5,300,000 government bonds		709,633.33
Total cash in Court August 3, 1953		2,185,558.60
U. S. Government coupon bonds		5,300,000.00
6085 shares of stock in San Francisco Bank issued to Long Beach Association at $100 par value per share		608,400.00
Total cash, bonds and stock in court (excluding conservator's notes of $6,300,000.00)		8,093,958.60

The interest coupons which have accumulated since the deposit in court on March 13, 1948 are attached to the bonds and to the date of August 3, 1953, the accumulated interest on the bonds amounted to $709,633.33. The coupons are the equivalent of cash, that is to say, they are cash. Title 12 U. S. C. A. § 1430(a)(4) provides

as follows: "If secured by obligations of the United States, or obligations fully guaranteed by the United States, the advance shall not be for an amount in excess of the face value of such obligations."

I am informed and have stated to counsel, who have not challenged it, that it is the practice of the San Francisco Bank as well as other banks of the Home Loan Bank Board system, to accept United States government bonds at their face value as security.

By the terms of 12 U. S. C. A. 1430(c) stock in the Home Loan Bank, issued to a Federal Savings and Loan Association is security for any indebtedness of the association to such bank. The stock certificates were in the possession of the Long Beach Association and were interpleaded by it. I understand from statements of counsel for San Francisco Bank that such practice is customary and it does not desire the possession of such stock certificates as the section of the act creates a statutory lien. This being so, the statutory lien would seem to prevail regardless of the provisions of Section 2988, California Civil Code that the lien of a pledge is dependent on possession. Therefore, the $608,400 worth of stock held by Long Beach Association in the San Francisco Bank is additional security on whatever indebtedness exists on the conservator's notes of $6,300,000, although in the formal order on this memorandum the stock certificates will be ordered returned to the Long Beach Association in keeping with the above mentioned practice.

Thus I regard the coupons as cash and the bonds as of their face value insofar as being acceptable as security by the San Francisco Bank.

The mandate directs the return of government bonds, interest coupons and cash to make the combined total of $6,324,098.35 with interest on $6,300,000 at 2% per annum from the 10th day of March, 1948, until the date of such release.

Tabulated as of August 3, 1953, the aggregate total to be returned under paragraph 3 of the mandate to San Francisco Bank is as follows:

Specific figure set forth in mandate		6,324,098.35
Interest at 2% from March 10, 1948 to and including August 3, 1953		680,399.99
Aggregate total to be returned under paragraph 3 of the mandate		7,004,498.34
which figure is made up as follows:		
U. S. Government bonds		5,300,000.00
Accumulated interest coupons thereon to August 3, 1953	709,633.33	
Cash from the registry of the court	994,865.01	
Total cash	1,704,498.34	
		7,004,498.34
Stock held by Long Beach in San Francisco Bank		608,400.00
Total security of San Francisco Bank		7,613,898.34
Face value of Conservator's notes		6,300,000.00
Excess of security over face of notes		1,312,898.34
less accrued interest to Aug. 3, 1953		704,498.34
Excess of security over principal and interest		608,400.00

The interest on the government bonds equals the interest due and accumulated on the $6,300,000 notes except for the sum of *14 cents* per day which difference I do not think is sufficient to affect the outcome of this litigation, particularly in view of the fact that as security therefor, and for attorney's fees and costs in 13979, the San Francisco Bank will have cash and its own stock, in excess of the face of the conservator's notes. It appears that the stock held by Long Beach in the San Francisco Bank has earned dividends which have not been paid to Long Beach and that the total thereof is about $50,000, which is still in possession of the San Francisco Bank. That sum is not taken into consideration in the above figures.

The bonds of $5,300,000 and their interest coupons are the property of the Long Beach Association subject to

whatever lien rights may exist in favor of the San Francisco Bank. Approximately $188,906.35 of the cash on deposit is involved in the Bellflower interpleader, the Turner interpleader, the Insurance Premiums interpleader, the F.H.A. bonuses and reconveyance fees to Title Service. It is undisputed that the balance of cash and property in the registry, is the property of the Long Beach Association subject to whatever lien rights may exist in favor of the San Francisco Bank.

I shall not, in this memorandum, attempt to make disposition of these items concerned in the Bellflower, Turner and Insurance Premiums interpleaders or the F.H.A. bonus and Title Service fees at this time but will leave them for appropriate motion on notice.

From the foregoing it is seen that there is ample substituted security on deposit in court to take care of all claims and demands which may arise in connection with, or upon the complaint of the San Francisco Bank, upon the $6,300,000 notes, in case 13979 without having recourse to or involving the borrowers' notes and trust deeds in this litigation.

The foregoing is additional support for the position that the mandate and right and justice require that the third persons involved in connection with the claims of the clouded titles should be relieved from all further possible litigation in connection with these matters by the order suggested hereinbefore.

I come now to the contention of the Long Beach Association that it is the duty of this court, in compliance with the mandate, to transfer such substituted security to the registry of the court in action 13979.

The contentions of the Long Beach Association are made in case 5421 by way of objections of Long Beach to the form and substance of proposed order No. 6. No separate *motion* was made or is pending in either 5421 or

13979 to make such deposit in 13979; but the matter is raised in 13979 by way of allegations in answer and cross-complaint.

The propositions upon which such contention rests may be very roughly stated to be as follows: suit No. 13979 by the San Francisco Bank, upon its notes and to foreclose its liens and pledges, was filed after the appeal in both 12511 and 12591, as well as a cross-claim by the San Francisco Bank for the same relief in consolidated actions 5421 and 5678; under the authorities such event is a change in circumstances occurring after the appeals, which requires this court to exercise its discretion and judgment independent of the mandate, and that this is particularly so in view of the fact that by the provisions of Section 1652 of Title 28 U. S. Code, the laws of the several states except where the Constitution, treaties or Acts of Congress otherwise require, or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply; that by the California Code of Civil Procedure, Section 726, "There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property which action must be in accordance with the provisions of this chapter"; and Section 572 of the California Code of Civil Procedure permits the deposit in court under certain conditions and by Section 3011 of the Civil Code of California, when a pledgee files a suit for foreclosure, instead of selling pledged property at private sale, he may foreclose by judicial sale.

It is further contended by the Long Beach Association that the San Francisco Bank, having elected to file the foreclosure suit is limited to a judicial sale, and the property should be in the custody of the court by being in its registry in order to effectuate such judicial sale

and to prevent the San Francisco Bank which has its headquarters in San Francisco outside of the territorial jurisdiction of this court, from exercising the right of sale under the pledge regardless of the foreclosure action, and further, that such deposit in court would prevent the San Francisco Bank from transferring the collateral and the cash outside of the State of California or from applying the cash turned over to it as payments on the note, the validity of which is contested by the Long Beach Association in action 13979.

It is further contended by the Long Beach Association that by turning the conservator's notes and property over to the San Francisco Bank this court is in effect making a judgment on the merits in 13979, and that neither of the opinions of the appellate court nor the mandate are to that effect, and any construction of them to that effect, is to hold that the appellate court had power which it did not possess to make a final judgment on the merits in a case not before them, viz., 13979.

Both parties have cited authorities in connection with their contentions. Upon examination of those authorities it appears to me that they support the contentions advocated by the Long Beach Association except the last above-stated. Reference is particularly made to Lord v. Garland, 27 Cal. 2d 840, 168 P. 2d 5; Lord v. Superior Court, 27 Cal. 2d 855, 168 P. 2d 14; Lord v. Ingels, 64 Cal. App. 2d 559, 149 P. 2d 72; Baumann v. Bedford, 18 Cal. 2d 366, 115 P. 2d 437; Metropolitan Finance Corp. v. Wood, 9 Cir., 175 F. 2d 209; Clarke v. Chicago, B. & Q. R. Co., 10 Cir., 91 F. 2d 561; Doyne v. Saettele, 8 Cir., 112 F. 2d 155; Louisville Trust Co. v. Knott, 6 Cir., 130 F. 820; McKinney v. Landon, 8 Cir., 209 F. 300, and to sections of the California Civil Code and California Code of Civil Procedure heretofore mentioned.

The difficulty with applying the principles of those cases to the situation at hand lies in the fact that the appellate court at the time of filing its opinion in 12511 on April 2, 1952 and in 12591 on November 6, 1952 and the making of the mandate on May 21, 1953, was not unaware of action 13979.

The appellate court, prior to any of said dates, had, on March 25, 1952, on motion of the San Francisco Bank and the official defendants, modified this court's injunction order of December 2, 1949, so as to permit the San Francisco Bank to file an action in the state court on the conservator's notes. As a condition thereof it required full and complete copies of the four conservator's notes to be attached to any complaint thereon. The appellate court further modified that injunction so as to permit the Long Beach Association to appear in, answer, defend, and participate in such actions. Such an action was filed by the San Francisco Bank in Los Angeles County on the 27th day of March, 1952, and on April 3, 1952 was removed to this court where it has since pended as action No. 13979 (a motion to remand said action to the State court was denied May 29, 1953). Action 13979 and its subject matter were again before the appellate court by motion of the San Francisco Bank to stay all proceedings in 5421 and 5678 in November, 1952, and on November 13, 1952, after hearing, the appellate court, issued an order staying all proceedings in actions 5421 and 5678 until the final disposition of the appeal then pending on the injunction appeal in 12511 and on the attorneys' fee appeal in 12591 *"except that said District Court is hereby permitted to entertain and determine the cause designated as 13979 filed in said district court."*

While, of course, all of the answers and cross-claims which have been filed in 13979 by the Long Beach Association and by the Mallonee group of shareholders deny-

ing any liability on the notes and attacking their validity, were not before the appellate court at the time of making the mandate, nevertheless it is completely unrealistic to suspect that the appellate court, in view of the vigorous contentions which were before them in appeals 12511 and 12591 concerning the validity of the notes and the actions of the conservator, would indulge the presumption that action 13979 on the conservator's notes for $6,300,000 would result in a default of Long Beach Association and not be contested. If the appellate court had not acted in connection with the stay and had not permitted the prosecution of action 13979 and thus had indicated no knowledge of the existence of that action, then I feel that I would be obliged to consider it as a change of circumstance which would compel me in spite of the mandate to make an order in action 5421 to retain the money and bonds in the registry of the court, and transfer them to action 13979 pending the final disposition of that action.

It is clear that the appellate court, with the knowledge of that action and contentions of the parties, nevertheless made the provisions of its mandate specific. I may say in passing that I can see no reason why the cash on deposit in court should not be converted into U. S. government bonds, but no formal motion has been made to that effect, although Long Beach Association indicated they desired to do so. In that connection, the parties could not have made such a motion pending the coming down of the mandate but such motion could have been made during pendency of the appeals and prior to the issuance of the stay.

The Long Beach Association expresses some concern that upon the bonds and cash being turned over to the San Francisco Bank that the San Francisco Bank may attempt to sell the bonds under the terms of the notes or apply the cash on account of the note and thus defeat

the contentions of the Long Beach Association made in action 13979 concerning the validity of the notes and their liability thereon and prevent a trial on the merits.

The San Francisco Bank is a public corporation; its officials are either public or quasi-public officials. The San Francisco Bank has filed its action 13979 in which it seeks to establish the validity of the notes as a charge against Long Beach Association and the foreclosure of the bonds and cash held by it as security. While the counsel for the Long Beach Association may feel justified in his fears concerning such actions to be taken by the San Francisco Bank, this court must nevertheless assume that the San Francisco Bank is acting in good faith. If the officials of the San Francisco Bank do sell the bonds and apply the cash on payment of the notes, as they have repeatedly disclaimed any intention of doing in this court, a question would, of course, arise as to whether or not the contempt processes of this court would be applicable against such officers or employees in action 13979, if not in the within action, or in the appellate court in violation of its mandate, as clearly the appellate court did not intend to pass upon the merits of the issues involved in case 13979 as indeed it could not.

The conclusions herein reached do not result in a decision on the merits in 13979. The bonds and cash are to be held only as security by the San Francisco Bank and the order will so provide, as I deem the mandate to require such provision. Furthermore, such order in 5421 will be without prejudice to any motion any party may desire to make in 13979 with relation to the custody of such security.

The motions in action 13979 are not herein decided but will require further study. They will be reached as soon as possible. A copy of this memorandum will be filed in action No. 13979.

Formal orders will be prepared and signed by the court at its earliest convenience to carry out the foregoing.

While the above memorandum was in the course of typing, a copy of the opinion of the appellate court in the appeals on the receivership and Special Master's fees was received. It, of course, is not final as neither the time for rehearing or certiorari has expired. In the meanwhile I shall make the orders as indicated herein, and upon receipt of the mandate hear any motions which any party may desire to present which they deem requires a different result from that herein indicated.

The above memorandum prepared for filing today, November 30, 1953, and just as its typing is concluded this morning, there was handed to me what appears to be a copy of a disclaimer by the San Francisco Bank, which is stated to have been recorded at 8:45 a. m. this morning. I assume that the original will be filed in action 5421 or 13979 after it is returned from the Recorder. It is on its face a disclaimer to the real property involved in all trust deeds deposited in court in action 5421-5678. I shall examine it and if it meets the requirements of the mandate as construed by the above memorandum, I shall promptly make the order for the return of the collateral.

2. Opinion of U. S. Court of Appeals Here Sought to Be Reviewed by Certiorari.

The opinion of the U. S. Court of Appeals for the Ninth Circuit entered July 18, 1955 in No. 14378 (reported as *"Federal Home Loan Bank of San Francisco v. Hall,"* 225 F. 2d Adv. 349) is in slip opinion form, and is contained in Appendix B herewith.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER and WILLIAM K. DIVERS, as members of the Home Loan Bank Board; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,

Petitioners,

vs.

HONORABLE PEIRSON M. HALL, Judge of the District Court of the United States for the Southern District of California; THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA; MALLONEE, BUCKLIN, and FERGUS, acting as THE SHAREHOLDERS PROTECTIVE COMMITTEE OF LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; TITLE SERVICE COMPANY; ROBERT H. WALLIS; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WILMINGTON; HOME INVESTMENT CO.; GEORGE TURNER; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BELLFLOWER and JOHN D. WILLHOIT,

Respondents.

No. 14,378

Jul. 18, 1955

ON MOTION FOR LEAVE TO FILE PETITION

AND

PETITION FOR WRIT OF MANDAMUS, INJUNCTION, AND OTHER APPROPRIATE RELIEF AND FOR RULE TO SHOW CAUSE

Before: STEPHENS, HEALY and BONE, Circuit Judges

BONE, Circuit Judge.

On June 4, 1954, above named Petitioners filed with this Court a motion for leave to file an attached petition in which they prayed for writ of mandamus, injunction and other appro-

priate relief, and for a rule to show cause directed to the Respondents above named. The prayer of the petition was for an order or orders as follows:

"1. Directing dismissal forthwith of Action No. 5678 in said District Court.

"2. Directing dismissal forthwith of Action No. 5421 in said District Court, together with all cross-actions, actions in interpleader, actions in intervention and third party actions pending therein.

"3. Directing dismissal of the cross-claim and third party complaint filed by Long Beach Federal Savings and Loan Association, the complaint in intervention and interpleader of Title Service Company, the complaint in intervention of Robert H. Wallis, the complaint in intervention of John D. Willhoit, and the cross-claim of Home Investment Company in said Action No. 13979.

"4. Directing the return forthwith to San Francisco Bank of promissory notes and collateral heretofore ordered returned by the mandate.

"5. Directing dismissal forthwith of Action 15588 in said District Court.

"6. Directing the remand forthwith of said Action 13979 to the Superior Court of the State of California in and for the County of Los Angeles.

"7. Enjoining respondents other than said District Judge and District Court from prosecuting any action or proceeding asserting issues which have been finally determined by this Court.

"8. For such other and further relief as to the Court may seem just and equitable."

Upon consideration of the allegations contained in said motion and petition, this Court entered an order granting leave to file the petition and directing that a written response thereto by Respondents named in said petition be filed with this Court and served upon counsel for the above named Petitioners.

Thereafter, Respondent District Judge filed with this Court his response, the same being a Return and Answer to the said

petition coupled with a motion to dismiss the petition. The Respondent Judge filed a brief in support of the allegations in the aforesaid documents.

The other respondents above named joined in filing a Return and Answer to the aforesaid petition. In this document these respondents appeared specially and voiced objection to the jurisdiction of this Court over the persons of these respondents or over the subject matter of the said petition.[1] Upon a prior

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[1]Our opinion in Home Loan Bank Board et al. v. Mallonee et al. (appeal in the Mallonee case reported in 196 F.2d 336) indicates that the several appellees in that appeal were:

Federal Home Loan Bank of Los Angeles and certain (six) of its member Associations; "Shareholders Protective Committee," members of this group being the plaintiffs in the so-called original Mallonee action; First Federal Savings and Loan Association of Wilmington (a member Association of the Los Angeles Bank); Robert H. Wallis; George Turner; Title Service Company; Home Investment Company of Long Beach and others, intervenors; Long Beach Federal Savings and Loan Association. The so-called Mallonee action, which was numbered 5421 in the court of Respondent District Judge, brought all of these parties into its original orbit by various interpleaders, cross-claims, answers and other pleadings filed therein.

These appellees in the original Mallonee appeal are asserting in the instant proceeding that in **none** of our (three) opinions and mandates thereon did we order that Respondent District Judge dismiss the said action (No. 5421) as a consequence of which that action is still "pending" in the court of the said Judge.

Two Respondent litigants named in the instant show-cause proceeding were not named as appellees in the Mallonee appeal. They are First Federal Savings and Loan Association of Bellflower and John D. Willhoit. They appear to have come into this pyramiding litigation at a later time.

The specific objection to the jurisdiction of this Court in this show-cause proceeding is voiced in the following statement.

> "No summons, order or other process of this Court of Appeals has been served upon said Respondents or any of them. The records of this Court of Appeals disclose the only service made was by mail upon counsel who had appeared for Respondents in entirely separate proceedings."

The records of the many cases in this litigation now pending before the lower court and the records of cases therein now pending on appeal in this Court, (all of these cases and pleadings therein being filed in, and as a part of, this prolonged litigation) serve to reveal that the parties plaintiff in the so-called "Mallonee-Association group" and parties collaborating with them in the early stages of that litigation are,

request of their counsel for advice as to the scope of argument we desired to have presented on the instant petition for relief we advised counsel for all parties that we desired them to defer argument on the question of *remand* of a certain action (here-

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through counsel, still actively asserting (in the various additional and pending actions referred to in this opinion) substantially the same rights they asserted in the original pleadings in the Mallonee case. The names of these original litigants are set out just above.

The objection to jurisdiction over the persons of Respondent litigants, due to lack of service of process on them, rises out of the fact that service herein was made on their counsel in the pending actions we refer to in this opinion. We think that service of process on counsel for Respondent litigants in the instant show-cause proceeding was proper and sufficient. Practically all of these litigants, as this opinion will indicate, are presently continuing to maintain and prosecute additional actions in which they revive and reassert all of the claims for relief originally asserted by them as complaining parties in the old Mallonee action. They assert that they are still parties in the original Mallonee action and (as above noted) that action has not been dismissed and is therefore still pending for trial in the court of Respondent District Judge.

As we shall later point out (see footnotes 3 and 6) we have before us the contention of these parties through their counsel that all of the issues in the Mallonee case have, by a Congressional act, been revived for trial anew in said district court precisely as though none of the issues therein had been adjudicated by any court. Certain additional actions, which are the subject of a later comment in this opinion, were directly filed in the old Mallonee action (No. 5421 below) and in other instances filed as new actions in which issues are presented which directly grow out of, and are an essential and vital part of the issues presented in the original Mallonee complaints.

It is clear beyond dispute that this procedure of Respondent litigants is a deliberate process invoked as a means of continuing the original Mallonee litigation by reviving all of the basic and controlling issues therein in the new actions filed in the lower court. It is significant that in the pleadings filed in these new and additional actions, the plaintiffs are represented by the same counsel representing them in the old original Mallonee action, and for this reason we regard as untenable the argument that such continuing counsel may not validly and effectively be served with process in the instant show-cause proceeding. This becomes all the more obvious when the whole record before us reveals that their clients are vigorously asserting the right to continue, and they are continuing, the litigation of all of the material issues presented in the original Mallonee litigation of 1946 by filing below the various new actions referred to.

The challenge to the jurisdiction of this Court to entertain the petition of petitioners and to proceed in the original writ proceedings before us is rejected as without merit.

after referred to as the "note case")[2] to a California State

[2]The so-called "note case" presents issues all of which had their origin in the issues which we considered and passed upon in our opinion reported in 196 F.2d 336, wherein we settled the status of Ammann as Conservator of Association. The four promissory notes involved in this action are the notes issued to San Francisco Bank in the name of and for the benefit of Association during the period in which Ammann was serving as Conservator of said Association.

A striking and typical example of the expanding and apparently illimitable orbit of this litigation is found in the pleadings of Association in two additional "fringe" actions in the said note case, No. 13,979 which were filed in the lower court on October 13, 1952. These two new actions were respectively styled "cross-claim" of Long Beach Federal Savings and Loan Association and "third-party complaint." In each of these two new actions (made part of case 13,979) approximately fifty-three individuals were made defendants and were named in their capacity as individuals, and/or as federal officials or federal agents serving in various capacities. Certain of this group were made defendants as individuals and as agents and officers of large federal agencies. The Federal Home Loan Banks of San Francisco, and the former Portland and Los Angeles Home Loan Banks were named as defendants along with an additional eight thousand "Does." This army of "Does" is variously identified in the caption of the pleadings as being composed of copartnerships, corporations, unincorporated associations and public officials. One thousand of them are identified as receivers, conservators, executors, administrators, guardians, trustees or other public representatives.

By the above cross-claim and third party complaint Long Beach has injected into the note case and seeks to relitigate all of the issues which were litigated and determined in the so-called consolidated actions and which were before us in the so-called "Mallonee" case. These pleadings bring in as defendants and cross-defendants substantially all the principal parties who had been named as cross-defendants in the "consolidated actions." They incorporate by reference and have attached as exhibits pleadings filed by Long Beach Association in the consolidated actions, a fact to which we refer in this opinion and where we also note the scope of the prayers for relief which covered and embraced all former pleadings of every kind in actions 5421-5678-7989 and make them a part of these new actions in case No. 13,979. (Action No. 5678 is the original "Los Angeles Action.")

In our opinion we also refer to cross-claims filed in the note action 13,979 by Title Service Company and Robert H. Wallis. In these pleadings these two litigants also seek the identical relief sought by them in the consolidated actions and incorporate by reference and have attached as exhibits all of the pleadings filed by them in the consolidated actions. In these pleadings they also name as defendants substantially all of the parties named in the above mentioned cross-claim and third party complaint of Long Beach Association, including the eight thousand defendant Does there designated by Long Beach Association.

Court. This action is now pending in the court of Respond District Judge under number 13,979. Two appeals growing ou of certain proceedings in the lower court in action 13,979 ar now pending in this Court under our docket numbers 14,[illegible] and 14,632. Pursuant to leave granted by this Court on M 25, 1952, action 13,979 was originally instituted in the Sta Court by San Francisco Bank and later removed to " lower court. Pursuant to our suggestion, no argument wa presented in the instant proceeding on the issue of *rema* of 13,979. (See paragraph 6, supra, of prayer of petitioner petition referring to said case 13,979.) The "note case" is a action instituted by San Francisco Bank against Long Beach Federal Savings and Loan Association (one of the Respondent litigants herein) to recover judgment on four notes of Long Beach (which had been given to evidence a loan to Long Beach while one Ammann was serving as its Conservator) and to foreclose the collateral securing the same.

In this opinion we will sometimes refer to the Respondent District Judge and to his court as the "District Judge," as the "court below" or as "the lower court," as the context will permit or suggest. Respondent litigants herein may be so designated, or merely be referred to as the "litigants." "Home Loan Bank of San Francisco" will be referred to as "San Francisco Bank." As a group, petitioners in the instant petition for relief may sometimes be referred to as the "petitioners herein" or "petitioners," and their petition as "petition" or "petition for relief." Any reference herein to "Association," "Long Beach Association" or "Long Beach," means the Long Beach Federal Savings and Loan Association, one of Respondent litigants herein. The term "consolidated cases" or "consolidated actions" means the two cases before us on the appeal in which we rendered the decision reported in 196 F. 2d 336, and frequent reference will be made to this decision. One of the cases before us on that appeal was the so-called Mallonee action; the other was the so-called Los Angeles action. We later refer to the status of the Los Angeles action (No. 5678 in the lower court) in the long litigation of which it was a part. Where we refer to Home Loan Bank Board the term includes "Administration" (in existence in 1946) where justified in context. As concerns the status of this Board, our opinion in the Mallonee

...e refers to certain reorganization orders creating "Administration" which were in force in 1946.

The above noted petition and all responses thereto came on for hearing before this Court on February 28, 1955, and arguments for all parties were presented. This Court has before it and has duly considered a vast array of copies of numerous records and files in many cases, which copies were filed as exhibits for our inspection by the several counsel present at the hearing. We find that these "exhibits" are correct copies of pleadings, records and documents now and/or heretofore lodged and filed in actions pending in the lower court, and we take judicial notice of these actions and pleadings therein. In this connection, it should be noted that Respondent litigants do not challenge the fact of their filing and docketing in the lower court, nor do they challenge the correctness of the said copies. All of said noted pleadings and actions directly relate to, embrace and/or present (as their controlling and basic contentions and issues) practically all of the contentions and issues heretofore presented, considered and adjudicated by this Court in three later noted opinions and decisions. See particularly our decision in case No. 12,511 (later noted Mallonee opinion) which dealt with and disposed of issues presented in what we there called and are here referred to as the "consolidated cases."

In addition to the above noted case records so filed with us, counsel for San Francisco Bank filed in open court at the argument a printed brief (styled "Partial Chronology") which "summarizes" certain of the pleadings and procedures in the lower court since our mandate of May 21, 1953 was issued. The procedural activities revealed by this additional summary of the record are so numerous that we are not justified in setting them out at length in this opinion. However, they are pertinent to our inquiry and have provided much aid in considering and disposing of the array of issues before us. This document was filed by reputable officers of this Court and no objection has been made challenging its filing or its accuracy in detailing the facts therein enumerated. We therefore accept it as a record correctly stating the facts therein set forth.

It is urged by petitioners herein that the scope, nature and form of orders and/or relief sought by them in the aforesaid

petition is justified and made necessary by the showing made in the records, files, and exhibits in the entire body of litigation which we here consider.

This litigation has been engaging the attention of the courts for approximately nine years, and petitioners argue that the aforesaid record clearly reveals that Respondent litigants have instituted, and are now instituting, numerous harassing proceedings and actions of the lower court (certain of these actions being still pending in said court) and that in and by such proceedings and actions Respondent litigants have wrongfully and erroneously asserted, and are continuing to assert legal claims for relief against these petitioners which are without basis or foundation in law in that such claims have been adjudicated adversely to such claims in and by previous controlling holdings and rulings of this Court in its opinions and decisions herein referred to, and in and by holdings and decisions of the Supreme Court of the United States directly affecting the litigation here considered.

And as a further ground for granting the relief here sought by petitioners, it is urged by petitioners that the lower court has wrongfully and without justification in law entertained, and continues to entertain, all of the said proceedings and/or actions all to the injury and harassment of petitioners and without regard to the said decisions and opinions of this Court and of the Supreme Court; that as a consequence petitioners have no adequate remedy against the proceedings here complained of save and except by and through the remedy prayed for.

Since our three opinions and decisions will be frequently mentioned we identify them and their dates at this point. They are:

Home Loan Bank Board et al. v. *Mallonee*, et al., Federal Home Loan Bank of San Francisco et al. v. Federal Home Loan Bank of Los Angeles, et al., No. 12,511, 196 F 2d 336, dated April 2, 1952.

Fahey et al. v. *O'Melveny & Myers*, et al., Federal Home Loan Bank of San Francisco v. O'Melveny & Myers, et al., No. 12,591, 200 F. 2d 420, dated November 6, 1952.

Fahey et al. v. *Calverley*, Federal Home Loan Bank of San Francisco v. Calverley, Fahey, et al. v. Gilbert, Fed-

eral Home Loan Bank of San Francisco v. Gilbert, Fahey et al. v. Walker et al., Federal Home Loan Bank of San Francisco et al. v. Walker, et al., Nos. 13,411, 13,558, 12,575, 12,898, 13,055, 208 F. 2d 197, dated November 23, 1953.

In the interest of brevity, these opinions and decisions will generally be referred to respectively as the "Mallonee opinion" (in the so-called "consolidated cases"), "O'Melveny & Myers opinion," and "Calverley opinion." Our Calverley opinion disposed of five appeals from the court below.

Pursuant to this Court's Mallonee and O'Melveny & Myers opinions and decisions, a consolidated mandate covering both decisions (cases 12,511 and 12,591) was issued by this Court on May 21, 1953.[3] A petition for certiorari was filed after a re-

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[3] No. 12511
No. 12591

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Home Loan Bank Board, et al., Appellants, vs. Mallonee, Bucklin and Fergus, etc., et al., Appellees, and consolidated case Federal Home Loan Bank of San Francisco, et al., Appellants, vs. Federal Home Loan Bank of Los Angeles, et al., Appellees.	No. 12511
John H. Fahey, et al., Appellants, vs. O'Melveny & Myers, et al., Appellees, and Federal Home Loan Bank of San Francisco, Appellant, vs. O'Melveny & Myers, et al., Appellees.	No. 12591

MANDATE

hearing had been denied in (Mallonee) case No. 12,511, which petition was denied by the Supreme Court on May 4, 1953, 345

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, GREETING:

WHEREAS, lately in the United States District Court for the Southern District of California, Central Division, before you or some of you, in consolidated causes between Mallonee, Bucklin and Fergus, et al, plaintiffs, third party plaintiffs and cross-claimants, and John H. Fahey, et al, defendants, Civil No. 5421-P.H.; and between Federal Home Loan Bank of Los Angeles, et al, plaintiffs, and Federal Home Loan Bank of San Francisco, et al, defendants, Civil No. 5678-P.H.; wherein an Order of Preliminary Injunction was duly filed, and entered on the 2nd day of December, 1949, and wherein an Order re allowance of attorneys' fees on account was duly filed and entered on the 19th day of June, 1950; which said orders are of record and fully set out in said causes in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

AND WHEREAS, the said John H. Fahey, et al, and said Federal Home Loan Bank of San Francisco have appealed to this Court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, on the 1st day of May, in the year of our Lord, one thousand nine hundred and fifty one, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted.

AND WHEREAS, on the 6th day of May, in the year of our Lord, one thousand nine hundred and fifty-two, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted.

AND WHEREAS, said actions were consolidated in the District Court for all purposes, and a review of decisions in both said appeals was sought by appellees upon consolidated petitions for writs of certiorari to the United States Supreme Court, which said petitions were denied on the 4th day of May, 1953:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the said orders of the said District Court in

U. S. 952. Rehearing was denied on June 8, 1953, 345 U. S. 978. Parenthetically, we point out that in the instant Return and Answer of Respondent litigants they argue that this mandate covering these two cases "is the only mandate enforcement of which is sought by petitioners' present writs."

As our Mallonee opinion (No. 12511) indicates, the court below had "consolidated" the Mallonee action (No. 5421 below)

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these consolidated causes be and hereby are reversed and that said consolidated causes be and hereby are remanded to the said District Court with directions to:

1. Dismiss Civil Action No. 5678-P.H. at the cost of plaintiffs.
2. Dismiss the following pleadings in Civil Action 5421-P.H.:

(a) The complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;

(b) The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party complainant and cross-claimant;

(c) The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant;

(d) The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;

(e) The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant;

3. Dissolve, set aside and vacate the order of said District Court entered the 13th day of March, 1948, insofar as the same requires Federal Home Loan Bank of San Francisco to deposit in the Registry of said District Court promissory notes in the aggregate principal amount of $6,300,000.00, collateral securing the same and any other documents or property deposited by San Francisco Bank pursuant to said order; and return to Federal Home Loan Bank of San Francisco without charge or impairment said promissory notes, together with Government bonds in the face amount of $5,300,000.00 with all interest coupons attached thereto at the time of deposit and together with cash from the sum in the Registry of said Court sufficient to make the combined total sum of $6,324,098.35, with interest on $6,300,000.00 at 2% per annum from the 10th day of March, 1948 until the date of such release.

4. Set aside and vacate said order of preliminary injunction entered the 2nd day of December, 1949.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said consolidated causes, in conformity with the opinions and judgments of this Court, as according to right and justice, and

with the (later noted) Los Angeles action (No. 5678 below). However, our opinion was primarily and almost exclusively de-

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the laws of the United States, ought to be had, the said appeals notwithstanding.

WITNESS, the Honorable Fred H. Vinson, Chief Justice of the United States, the 21st day of May in the year of our Lord one thousand nine hundred and fifty three.

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CLERK, UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

In argument on the instant petition for relief, counsel for Respondent litigants voiced the following contentions as to the meaning these litigants ascribed to the language of the mandate and to the meaning of language in the "Housing Act of 1954":

> "All that you said in your Mallonee opinion, in your Mallonee mandate was it was jurisdictional; to go exhaust administrative remedies."

In response to a question from the bench as to whether counsel thought that **all** that was decided by us in the original case (the Mallonee appeal, 196 F.2d 336) "was jurisdiction of the court to hear it," counsel replied "that is right—that summarizes our position."

As to certain **new actions** pending in the lower court, counsel stated that they were "filed under the Housing Act in express reliance, and process is being served thereunder." As to these new actions counsel also stated that "our new actions under the 'Housing Act of 1954' carry those changed conditions. **That** is the basis of the cases I have cited that your **mandate** based on an opinion in 1952 and issued in 1953 [consolidated mandate in Mallonee and O'Melveny & Myers cases] should not result in our being enjoined from the jurisdiction that Congress has expressly conferred [in the Housing Act] **or** from a defense on the merits in 13,979." (Emphasis ours.)

A question from the bench was directed to the above statement in which counsel was asked whether "even in the absence of any of the legislation [Housing Act] or in the presence of it, either way, you are entitled to go ahead with what you are attempting to do,". To this query counsel agreed that they were entitled to make a defense in the district court in the foreclosure action (No. 13979) **and to proceed with any affirmative action that they thought they should have in the proper jurisdiction.** We must assume that this means and includes any new (affirmative) proceedings in the lower court which will continue the litigation of issues presented by Respondent litigants at the very start of this long litigation (including the issues in the Los Angeles action). In the body of the opinion we note the institution of several new suits in which this sort of "affirmative action" is reflected. And see footnote 6 herein.

voted to a consideration and disposal of the many issues presented in case No. 5421 below. In this opinion we deferred for possible later determination in any appeal to this Court the issues then pertinent only to the so-called Los Angeles action.

After our second opinion (No. 12591) in the O'Melveny & Myers case petitions for writs of certiorari to review our decisions in 12511 and 12591 were filed with the Supreme Court. Certiorari was denied on May 4, 1953, 345 U.S. 952, rehearing denied June 8, 1953, 345 U.S. 978.[4] See our later comment on

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[4]Our opinion (196 F.2d 336) dealing with the issues in these "consolidated cases" (Mallonee action and Los Angeles action) emphasizes the wide scope, complexity and close relationship of the many legal issues and claims tendered by the numerous parties who were brought within the orbit of, and became parties in, the so-called "Mallonee action" prior to the time the issues in that case reached this Court, one of these parties being the Federal Home Loan Bank of Los Angeles, along with six of its stockholding member Associations who joined with Los Angeles as party plaintiffs in its independent plenary action. Wilmington Federal Savings & Loan Association, a stockholder member of the Federal Home Loan Bank of Los Angeles, was one of these six co-plaintiffs in the original "Los Angeles action."

We take judicial notice of the fact that several briefs were filed in the Supreme Court in the certiorari proceedings in which review of our decisions No. 12511 and No. 12591 was sought. Since our decision in the O'Melveny & Myers case dealt in no small part with the status of Federal Home Loan Banks and the System of which they are a part, the validity of our conclusions and holdings with respect to the relationship and obligations existing between Home Loan Banks and their stock-holding member Associations, were vigorously challenged. These briefs were filed in the October Term, 1952 and there numbered 591, 592, 593, 594, 595, 596 and 658.

One of these briefs (591) was filed by and on behalf of Long Beach Federal Savings and Loan Association and on behalf of the original plaintiffs in the so-called "Mallonee Case."

Another brief (592) was filed by and on behalf of Wilmington Federal Savings & Loan Association and W. I. Gilbert, and on behalf of Federal Home Loan Bank of Los Angeles, and its stockholders. (The record indicates that neither the Los Angeles Bank nor O'Melveny and Myers, its attorneys, nor five out of six original plaintiff member associations which had joined in the original Los Angeles Action (5678) were seeking review of our decision No. 12591 in this certiorari proceeding.)

It is highly significant, in that it reflects the views of the Mallonee-Association group of petitioners concerning the holdings of this Court, that in their petition for certiorari (No. 591) these litigants specifically represented to the Supreme Court (p. 4 of petition) that "in 1952, the

the relationship of issues in the O'Melveny & Myers case to those in the Los Angeles action.

Our third opinion was in the Calverley case wherein it appears that issues in four other cases were also involved and disposed of. The issues posed in these five cases were so closely related to and intimately involved in the issues disposed of by our two previous opinions that they were literally part and parcel of the many issues decided in the opinions in these first two appeals, and particularly in our decision in the Mallonee case. A petition for certiorari in the Calverley case was denied by the Supreme Court on April 26, 1954, 347 U. S. 955.[5]

Our opinion and judgment of November 23, 1953, in the five appeals in the Calverley case (Nos. 13,411, 13,558, 12,575, 12,893 and 13,055) dealt with appeals taken by petitioners herein from orders entered by the district court in the "consolidated actions" above referred to. In our opinion and judgment we reversed the various orders of the district court from which appeals had been

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Court of Appeals **holds** it was error for the district court not to have dismissed the **actions** in 1946, holding the district court **was at all times wholly without jurisdiction of the subject matter.**" Again, on page 17 of the brief of these petitioning parties they represented to the Supreme Court that in appeals 12,511 and 12,591 "such appeals resulted in **opinions** by the Court of Appeals in 1952, that the District Court **has at all times been without jurisdiction of the subject matter of the** [consolidated] **actions, and ordering dismissal (196 F.2d 336 at 379, Op. in Appeal No. 12,511).**" (Emphasis ours.)

We wholly agree with the conclusions thus expressed in the brief of Association that this Court, in its opinion there referred to, ordered dismissal of these **actions** and we find no reason to part company with the conclusion of Association and its collaborating petitioners that dismissal of the **actions** had been ordered by this Court.

[5]Our five several mandates issued pursuant to our said Calverley decision provided, inter alia, that cause number 13411 be, and hereby is, remanded to the court of Respondent District Judge with directions to that court to (1) vacate the (its) order appointing said receiver and filed and dated March 15, 1952; (2) dismiss the complaint filed by said receiver in the Superior Court of the State of California in and for the County of Los Angeles and thereafter removed to the said District Court being action 13,952-P.H. in the files of said court; (3) dismiss the cross-claim filed by said receiver in consolidated actions 5421-P.H. and 5678-P.H. (the "consolidated actions" last mentioned were the consolidated actions considered and disposed of in our opinion and decision in the Mallonee case.)

taken, on the ground that the actions in which said orders were entered presented no justiciable controversy within the jurisdiction of the district court. As the district court noted (Mallonee v. Fahey, 117 F. Supp. at 292), a copy of this Court's opinion of November 23, 1953 was before it while its memorandum was being written, but the district court chose to disregard it because that opinion "is not final as neither the time for rehearing or certiorari has expired."

Mandates of this Court in the Calverley case were issued on May 4, 1954, pursuant to and in conformance with our decision in that case. Respondent District Court on June 8, 1954, following a hearing held on May 24, 1954, entered orders in the form proposed by petitioners in the instant proceeding. These orders vacated four interim orders awarding fees to the Special Master which were the subject of the appeals 12,575; 12,893 and 13,055; vacated the orders appointing a receiver and allowing the receiver costs which were the subject of appeals 13,411 and 13,558 and dismissed the cross-claim and the separate complaint filed by the receiver. Apparently all matters pertaining to the receivership have now been disposed of, or at least our attention has not been drawn to any residue of controversy over this matter. We later comment on an issue concerning payment of fees to the Special Master.

THE LOS ANGELES ACTION

We digress to point out that the independent plenary action (No. 5678 below) instituted by the Federal Home Loan Bank of Los Angeles in August of 1946 was drawn within the orbit of and consolidated with the Mallonee case, which had previously been instituted in May of 1946. (See reference to the Los Angeles action on pages 341 and 343 of our opinion in the Mallonee case.) This action by Los Angeles Bank was therein referred to as the "Los Angeles action."

The issues tendered by plaintiffs in the Los Angeles action were never tried below on the merits, hence these issues were never directly before us for decision on an appeal in that case. However, the major and controlling issues tendered in the lower court by the pleadings of the plaintiffs in the original Los Angeles action, and particularly those dealing with the status of Federal Home Loan Banks, were subsequently before us and

were necessarily considered and disposed of in our O'Melveny & Myers opinion. The appeal in the O'Melveny case arose out of a challenge by petitioners in the instant proceeding to the validity of an order in which the trial court granted attorneys' fees to counsel for Los Angeles Home Loan Bank. In our O'Melveny & Myers opinion (p. 481) we remanded the O'Melveny & Myers case to the lower court with directions to the lower court to dismiss the Los Angeles action. So much for the Los Angeles action.

Because of their vital bearing on the complicated issues now before us on the petition we feel obliged to burden this opinion by noting certain of the more important and highly significant procedural steps (including the filing of certain "new actions" in the lower court) following issuance of our mandate of May 21, 1953. While these events are far from a complete list they serve to point up with emphasis the unremitting efforts of Respondent litigants to relitigate, or to *continue* litigating, the same vital issues we considered and disposed of in our three noted decisions. See comments in footnotes 3 and 8 regarding expansion of the litigation.

This record also serves in small measure to make plain the extent of the onerous duties imposed upon Respondent District Judge who since early in 1946 has been compelled to wrestle with the incredible confusion growing out of innumerable problems being steadily thrust to the front in this continually expanding litigation. This burden has been added to the task of disposing of many other civil and criminal cases crowding the docket of his court since 1946.

As we shall later indicate, Respondent litigants rest, in part, the claim of right to pursue this course of renewed and continuing litigation on specific language appearing in the "Housing Act of 1954."[6] However, it should be emphasized that

[6]Public Law 560, 83rd Congress, Chapter 649, 2nd Session, H.R. 7839. See 12 U.S.C.A., Sec. 1464(d)(1) and 68 Stat. 648, Sec. 818. Section 818 of the "Housing Act of 1954" appears in the code merely as an editorial note to Section 1703 of Title 12 U.S.C.A. and will be found on page 128 in the pamphlet supplement under the caption "Inconsistent Laws." (The Act was approved on August 2, 1954.)

The language principally relied on appears in Section 503 of said "Housing Act of 1954" in that part of the Act (Title V) relating to the

many proceedings in the continuous process antedate the effective date of that Act—August 2, 1954.

On May 25, 1953, petitioners presented to the said district court their motion (followed by a written motion served and filed about May 28, 1953) that the said mandate of May 21, 1953, be spread upon the records of the said district court and the judgment be entered pursuant thereto. Petitioners also presented to the said district court a form of order in the terms of this Court's mandate. The district court declined to spread said mandate or to take any action in connection therewith until June 24, 1953, when, upon further hearings, it ordered the mandate spread but continued to August 3, 1953, further consideration of the entry of orders on said mandate and directed petitioners herein to submit on or before July 17, 1953, a separate form of order as to each provision of our said mandate. Pursuant to such direction, petitioners, on July 16, 1953, filed 14 separate proposed orders. Oppositions and counter proposals

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"Home Loan Bank Board." In the argument before us, counsel for Respondent litigants carefully marked the particular language upon which they now rely to support their vigorous contention that by the use of such language Congress "has made moot all of the issues asserted in the petition of petitioners herein." This marked language, together with the language of Section 818 of said "Housing Act of 1954," which is also relied on, reads as follows:

"Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Home Loan Bank Board, Washington, District of Columbia."

"Sec. 818. Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling."

were filed on or about August 3, 1953. Thereafter, at the suggestion of the district judge, petitioners filed a response to such oppositions wherein they requested an early disposition of the proceedings in accordance with the said mandate of this Court. With the sole exception of one order entered September 21, 1953, nothing further was done until October 12, 1953, when the lower court commenced a series of hearings lasting eight days at which arguments were heard on the proposed orders, upon requests for affirmative relief inconsistent with the opinions and mandate of this Court, and upon various motions filed in pending action 13979 (the above mentioned "note case," see footnote 2) which the district court considered to be interrelated with the said "consolidated actions." On November 30, 1953, the district court filed a memorandum of opinion on mandate (117 Fed. Supp. 259) indicating the court's intentions with respect to the orders to be entered.

Following the November 30, 1953 opinion on the mandate the said district court on December 11, 1953 entered orders dismissing the cross-claim of one Roy Hegg and the principal pleadings listed in the mandate. The district court, however, declined to enter judgment dismissing the so-called Los Angeles action. Likewise, it refused to enter orders vacating its prior orders relating to the accounting by the prior Conservator of Association (A. V. Ammann, whose status was discussed in our Mallonee opinion), refused to vacate its prior orders for inspection of the records of San Francisco Bank, dismissing the cross-claim of George Turner, dismissing the complaint and intervention of John D. Willhoit, denying the petition and supplement thereto of First Federal Savings and Loan Association of Bellflower to interplead stock subscriptions, and dismissing the purported petitions and interpleader in re insurance premiums payable to Federal Savings and Loan Insurance Corporation, all of which proceedings were ancillary to the main so-called "consolidated actions" (see Mallonee opinion) and none of which had an independent basis for federal jurisdiction. See this Court's Calverley opinion.

Notwithstanding the three above noted opinions of this Court holding the district court without power to proceed in the "consolidated actions," the district court undertook affirmative action *therein* when it directed a Special Master it had appointed to

file a final report and request for fees (Mallonee v. Fahey, 117 F. Supp. at 272), which matter was argued before the district court in January, 1954. But see Mallonee v. Fahey, etc., 122 F. Supp. 472 re master's fees.

On January 22, 1954, the district court, on motions of Association and collaborating parties, entered an order in the "consolidated actions" substituting as parties defendant and cross-defendant certain of the so-called official defendants, i. e., present and former members of the Home Loan Bank Board, and in that order the said district court stated that *"substantial need for continuing and maintaining the above-entitled (consolidated) action was satisfactorily shown to this court."*

The mandate of this Court (footnote 3, supra) specifically directed the said district court to return to San Francisco Bank the promissory notes and collateral securing same. The district court on December 11, 1953, entered an order directing that such property be delivered to San Francisco Bank on December 22, 1953. But on December 21, 1953, upon the ex parte application of Association, the district court entered an order staying the enforcement of its said order of December 11, 1953, *upon the ground that an application had been made in the "related" and above mentioned "note case"* (13979) *for the retention of such property in the Registry of the court. Said stay is still in effect.*

It is clear that by this last mentioned order staying the enforcement of its delivery order of December 11, 1953, the lower court was subjecting the Bank's collateral to the final outcome of Action 13,979 without the consent of the Bank, thereby materially impairing the contract rights of the Bank. On June 10, 1954 the court rendered a memorandum opinion entitled and and filed in *both* the "consolidated actions" and *note* case, 13979. This opinion consists of 90 pages, plus 58 pages of exhibits and and is before us as an exhibit on this hearing. The length and complexity of the memorandum makes it impractical to summarize its contents. The order therein proposed by the lower court would substitute for the collateral now in the registry of the court (which San Francisco Bank is entitled to receive under our mandate) entirely new collateral of approximately $7,000,000 of United States Government Bonds. It would also impose on such substituted collateral conditions and re-

strictions to which the collateral was not subject at the time it was impounded by order of the district court. We view such a proposal as a direct violation of our mandate of May 21, 1953. We mention this matter because San Francisco Bank is entitled to be restored as nearly as possible to the status as a secured creditor of Association which it occupied prior to the impound and release of the individual borrowers' notes and deeds of trust. If this order is executed San Francisco Bank would be compelled to accept collateral to be selected by Association and the lower court. For nearly eight years Association has had on deposit in the Registry of the court approximately $1,500,000 in cash upon which no interest has been earned, and since December, 1947, the coupons attached to $5,300,000 of Government Bonds in the Registry of the court have not been cashed. This situation merely spells out a continuance of pre-existing conditions. Since March, 1948, San Francisco Bank has not received any interest on its notes of $6,300,000 and the accumulated interest on such notes does not bear interest. The loss here noted has resulted solely from the acts of Association in obtaining the impound of the collateral security. These matters are to be kept in mind by reason of the fact that the mandate of this Court required that the bonds and cash in the Registry of the court should be returned to San Francisco Bank "without charge or impairment" and the district court is without authority to charge the collateral with conditions which would materially reduce its value as collateral by creating a new contract between the parties which we think the court was without jurisdiction to make.

The lower court also obviously sought by its proposal to require the San Francisco Bank to give a form of receipt for the returned collateral which would restrict the *use* of the collateral to payment of the amount "finally adjudged to be due on the conservator's notes to San Francisco Bank * * * in Action 13,979 * * *." The practical effect of the proposed order of the district court limiting the *use* of the collateral would be to continue the existing impound of the collateral for an indefinite period of time and to destroy the Bank's collateral security altogether if for any reason action 13,979 should fail through some technicality. From all of this it appears that the force and effect of the mandate of this Court has been

evaded to the extent noted by the process of entering a contradictory order in a related action involving the same parties.

And see Independent Nail & Packing Co. v. Perry, 214 F. 2d 670 (cited in footnote 10, infra) where the court held that the district court's order staying a judgment entered pursuant to a mandate from the court of appeals violated the mandate, and it issued a writ of mandamus to put its judgment into full force and effect.

We have indicated above why we do not here dispose of the *remand* issue in said "note case," but reference to this case is necessary because of the important bearing of that action (still pending in the lower court) on the issues before us. This "note case" was an action instituted on March 27, 1952 in a State court by San Francisco Bank against Association to recover judgment on the four notes delivered to that bank by A. V. Ammann while he was serving as Conservator of Association. These notes were given to evidence a loan to Association which loan had been negotiated by Ammann, and the purpose of the suit in the State court was to recover judgment on these notes and to foreclose the impounded collateral securing the same. The suit was instituted pursuant to leave granted by this Court on March 25, 1952. These are the same notes and collateral which had originally been impounded by the district court *in the consolidated actions above mentioned* and which this Court's mandate of May 21, 1953 directed be returned to the San Francisco Bank. In the Mallonee action Association had directly challenged the validity of these notes and had sought their cancellation on the ground, among others, that they had been executed by a conservator whose appointment was void, notwithstanding the fact that the status of the Conservator had been settled by Fahey v. Mallonee, 332 U.S. 245, and ex parte Fahey, 332 U.S. 258.

Upon petition of Association, said note action was removed to the district court, where it now bears number 13,979. San Francisco Bank moved to remand this action to the State court. On May 27, 1953, the lower court entered an order and opinion denying this motion.

By answer, cross-claim and third party complaint (filed in the "note case")[2] Association has injected into this "note

case," and seeks to relitigate therein, *all* of the issues which have been litigated and in our view finally determined in our Mallonee opinion in the "consolidated cases." Its cross-claim and third party complaint are two pleadings so lengthy as to defy an attempt at any sort of reasonable analysis. They name as defendants and cross-defendants therein substantially all of the principal parties who had been named as cross-defendants in the original *consolidated actions.* They incorporate by reference and have attached thereto as exhibits, the pleadings filed by Association in the original "consolidated actions." They also name as party defendants the huge army of Does to which we have made reference in Footnote 2. For example, each of the prayers for relief in the cross-claim and third party complaint contains the following:

> "All prayers for relief in *all* former pleadings, cross-claims, petitions, motions, answers, complaints, *all* other documents filed by this third party plaintiff in said action 5421-5678-7989-P.H. *are hereby incorporated herein by reference and made a part hereof as if herein set forth at length,* except as to matters previously granted to this third party plaintiff by final judgments and orders of the Court." (See footnote 3.)

One of the many prayers for relief in the said cross-claim of Association reads as follows:

> "Re incorporating of all prayers for relief from former pleadings.
>
> "*All* prayers for relief in all former pleadings, cross-claims, petitions, motions, answers, complaints, or other documents, filed by this cross-claimant in said Action Nos. 5421, 5678, 7989-P.H., *are hereby incorporated herein by reference and made a part hereof the same as if set forth herein at length.*" (Emphasis ours.)

Counsel for Respondent litigants frankly stated in argument before us on the instant petition that an issue his clients want to try all over again in action 13,979 is the *validity* of the *seizure* of the assets of Los Angeles Bank when these assets were transferred to San Francisco Bank. The claim that Los Angeles Bank had been "unlawfully seized" was one of the principal

issues considered and disposed of adversely to that claim in our O'Melveny & Myers opinion, supra.

In addition to the foregoing mentioned answer, cross-claim and third party complaint filed in the note case, Association also filed an "answer" (on October 13, 1952) to the complaint of San Francisco Bank in the note case. The answer is very lengthy and we do not burden this opinion with a recital of its many allegations, but we think it desirable to note that in the demand for relief in this pleading Association prays that the lower court order its clerk to cancel and nullify the (four) promissory notes which were the basis of the suit of San Francisco Bank. Association further prays that the lower court adjudge and decree that said Association "is under no liability or obligation of any nature whatsoever, either because of, or by reason of, said notes or otherwise to said purported San Francisco Bank or any of said cross-defendants."

Here again is an undisguised frontal attack on the *authority* of Conservator Ammann to execute the four notes of Association which of course also constitutes a challenge to, and a denial of, the *validity* of his appointment as Conservator of Association back in 1946.

In connection with the foregoing references to prayers for relief we again note that action No. 5421 was the original "Mallonee action" and action No. 5678 was the original "Los Angeles action" both being instituted at the beginning of this litigation early in 1946.

Cross-claims filed in the "note action" (No. 13,979) by Title Service Company and Robert H. Wallis also seek the *identical relief* sought by them in the original "consolidated actions," and incorporate by reference and have attached as exhibits all of the pleadings filed by them in the said "consolidated actions." These two cross-claims of Title Service and Wallis (filed as "proposed" complaints) also named as defendants apparently all of the defendants named in the complaints of Association to which we refer in footnote 2 herein, including the eight thousand "Does" sued by Association.

Following our O'Melveny & Myers opinion San Francisco Bank filed in the said "note action" 13,979 in June, 1953, motions to strike and to dismiss the cross-claims and third party

complaint filed by Association and collaborating parties on the ground, among others, that said pleadings seek to relitigate issues which this Court in the "consolidated actions" had determined were beyond the power of the district court to entertain. These motions were opposed and after several continuances were finally heard by the district court in conjunction with the arguments on forms of orders on mandate in an eight day series of hearings commencing October 12, 1953. We are not advised that any decision on these motions has yet been rendered.

Association, in response to the district court's apparent suggestion in its opinion on mandate of November 30, 1953 (Mallonee v. Fahey, 117 F. Supp. at 289, 292), filed in the said "note case" on December 21, 1953, a "Motion for Retention of $14,000,000 of U. S. Bonds, Cash, etc., in Registry of Court in Foreclosure Actions" seeking in effect to prevent delivery to San Francisco Bank of the notes and collateral on deposit in court, the return of which had been directed by this Court's mandate of May 21, 1953, in the "consolidated cases." The district court thereupon issued on December 21, 1953, an order returnable January 11, 1954, to show cause why the relief requested in the motion should not be granted. Response was made by San Francisco Bank opposing the motion. So far as we are advised, the motion is still pending and undetermined. By failing to dispose of this motion in the "note case" the district court has maintained in full effect its stay entered in the "consolidated cases" suspending the delivery of the said notes and collateral to the San Francisco Bank.[7] We have heretofore commented at some length on this stay procedure.

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[7]In the reported opinion in Mallonee v. Fahey, 117 F. Supp. 259, 283 the lower court sets forth that the complaint of San Francisco Bank in No. 13,979 appears to be a complaint to foreclose a lien upon the United States Bonds and all of the individual borrowers' notes and trust deeds securing them (about 6000 separate trust deeds and notes) which had been ordered impounded in the Registry of the court by an order of March 13, 1948. The court here observes that these individual borrowers' notes and trust deeds were later delivered to Association pursuant to an order of court dated March 26, 1948, and to the date of the opinion (November 30, 1953) about 1700 of them had been paid in full. And see pp. 283, 284, of this opinion for details concerning the impound of the bonds and notes.

And see further comment of the lower court in Federal Home Loan Bank of San Francisco v. Long Peach Federal Savings and Loan Associ-

NEW ACTION No. 15,588

On June 5, 1953, Association filed another action (No. 15,588) in the lower court naming as defendants therein all the principal parties who had been cross-defendants in the original "consolidated actions." In the complaint, a copy of which is before us as an "exhibit," Association repeats allegations made by it in cross-claims in the original "consolidated actions" and seeks to relitigate issues heretofore considered and adjudicated by this Court in our opinion in the said "consolidated actions." We are advised that Association has so far withheld service of process in this pending action although orders of substitution of certain parties defendant have been entered therein on January 22, 1954. The complaint in 15,588 is one in interpleader and for declaratory relief. It names as defendants the various parties who had been named as defendants in the two new actions referred to in Footnote 2, supra, including the 8,000 unidentified Does referred to in that footnote.

In their brief filed in the instant show cause proceeding Respondent litigants, in resisting the granting of the fifth prayer of the petition which involves action 15,588, frankly argue to us that:

> "Petitioners seek to prevent any trial of the merits of action No. 15,588, untried and unheard in either trial or appellate courts, *because* in said action Respondent Association '• • • reasserted claims previously made in [all of] its various pleadings *in the consolidated actions* • • •'. The pleadings so referred to were those filed in 1946 and ordered dismissed by the Court of Appeals for failure to then [in 1946], exhaust administrative remedies. Action No. 15,588 was filed seven years later in June, 1953." (Emphasis ours.)

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ation, 122 F. Supp. 401, 445, 446 referring to the impound of bonds, cash, notes and trust deeds, and the (then) payment by borrowers from Association of more than 2000 of the loans to secure payment of which these notes and trust deeds had been given.

Reference is made to these notes and trust deeds because they are clearly embraced within the orbit and meaning of a "disclaimer" filed by San Francisco Bank in action No. 13,979 in which document the Bank disclaims any and all right, title or interest in the real property subject to the lien of these notes and trust deeds. We refer to this disclaimer of San Francisco Bank at a later point in our opinion.

As to this action, Respondent litigants further state in their brief that "it [the complaint] was amended in August, 1954, to utilize the express jurisdiction conferred on respondent District Court by the Housing Act of 1954."

In addition to this argument, Respondent litigants also assert in their brief that petitioners herein are presently defendants in two *consolidated actions* in the United States District Court (Nos. 5421-5678). These two actions were the ones instituted by the Mallonee group *and* Los Angeles Bank early in 1946, and this argument makes abundantly plain that Respondent litigants are aggressively contending that *both* of these original 1946 actions are still pending in the lower court for relitigation despite anything said in the above noted three opinions of this Court (and mandates thereon). During oral argument on petition of petitioners herein, counsel for Respondent litigants referred to (and later filed with us as an exhibit) a "joint reply" of plaintiffs and cross-claimants which was captioned and filed in the original Mallonee action 5421. This pleading was filed in the lower court on November 26, 1954. It was a reply to the opposition of petitioners herein to motions of Respondent litigants to *amend* their pleadings in that original action to show present jurisdiction of the lower court of action 5421 *under* the noted provisions of the Housing Act of 1954.

In the complaint of Association in 15,588 it denies (and attacks) the *validity* of the 1946 appointment of Ammann as Conservator of Association and the *validity* of the $7,000,000 loan made by San Francisco Bank to Association while Ammann was serving as its Conservator. Association also denies for itself, and on behalf of the original Mallonee litigants, all liability upon the debt owing to San Francisco Bank by Association. (This debt is the subject of the "note case," 13,979.)

The lower court also makes abundantly plain in its opinion in Mallonee v. Fahey, 117 F. Supp. 259, 275, that Association was then challenging the *validity* of the appointment of the Conservator back in 1946 by pointing out that Association is still asserting that the validity of this appointment "has not yet been determined on the merits, either by administrative hearing or judicial proceedings in review thereof."

So much for Action No. 15,588.

In addition to the various pleadings filed in the "note case" *and* in action No. 15,588, Association has, since the filing of the petition of petitioners herein, filed in the court below complaints in four new actions which we note at this point. (And see reference to these "new actions" in footnote 3.)

A complaint (61 pages, plus exhibits) filed August 27, 1954, in new action 17,133, which includes among the named defendants practically all the defendants in original Mallonee action 5421, and which alleges that it involves the same parties, issues and subject matter as action 5421. The complaint was for interpleader, quiet title and declaratory relief. *On the same day Association filed notice of pendency of 8 other related cases.*

A complaint (62 pages, plus exhibits) filed August 31, 1954, in new action 17,152, designated a complaint in interpleader and for declaratory relief re federal insurance of savings deposits and the $7,000,000 denied debt, and naming, among parties defendant, Home Loan Bank of San Francisco, Home Loan Bank of Portland, Home Loan Bank of Los Angeles, Utley as Receiver, Calverley as Receiver, and *all parties heretofore designated as official defendants.* This complaint attacks the status of San Francisco Bank, the validity of Ammann's appointment and the loan by this Bank to Association (the subject of the note case).

A complaint (82 pages) filed August 31, 1954 in new action No. 17,153 naming the same defendants as those above noted in action No. 17,152 and seeking interpleader, declaratory relief and injunctive relief and money for attorneys' fees to defend against foreclosure (in the "note case"), seizure and confiscation of Long Beach Association. The complaint in this action attacks the order of the Federal Home Loan Bank Board appointing a conservator for Association back in 1946, and the declaratory relief it seeks is based on the claims made in the original consolidated actions of 1946 (No. 5421, Mallonee case, and No. 5678, Los Angeles action) and also on all litigation then pending (including No. 13,979).

A complaint filed August 31, 1954 in new action 17,154 (naming the defendants as those noted in action 17,152) purportedly brought under the Housing Act of 1954, and seeking return of collateral now in the Registry of the Court, an accounting, cancellation of San Francisco Bank notes, and to quiet title to

plaintiff's money. This action also seeks judicial review and nullification of *all* administrative orders of the Home Loan Bank Board (including "Administration"), (1) appointing the conservator in 1946, (2) terminating his appointment in 1948, and (3) for the administrative hearing in 1949, which respondents enjoined, which injunction this Court reversed in appeal 12,511 (196 F. 2d 336). The complaint (122 pages) also demands money damages and the "enforcement" of all judgments and orders from which no specific appeal has been taken and made in 5421 (Mallonee action), 5678 (Los Angeles action), 7989 (Newendorp action), 13953 (receiver action) and 13,979 (note case), and for attorneys' fees and other relief. On the date of filing this complaint Association also filed notice of pending of five other "related cases" (referring to consolidated cases, note case, receiver's dismissed action—13,953—and action 15,588) upon which order for transfer of above noted cases 17,152, 17,153 and 17,154 was ordered.

In each of these four additional actions (above noted) Association designated by name a veritable army of deefndants, and in addition thereto joined as defendants 8,000 unidentified Does. As is true of so many of the pleadings in the various actions we have mentioned, the pleadings in these four actions are so lengthy and cover so many phases of the litigation that even an attempt at a summary could not be justified.

We here note that two additional appeals to this Court growing out of note case 13,979 have recently been filed. They are numbered 14,632 and 14,587 on the docket of this Court. The record in No. 14,632 (filed January 20, 1955) has not yet been lodged with this Court. The record in No. 14,587 has been lodged but is so enormous as to forbid an attempt to summarize the issues tendered on that appeal. They involve many parties to the litigation.

In addition to the pleadings filed in the note case and in action 15,588, Respondent litigants have, since the filing of the petition of petitioners herein, filed in the lower court additional motions, pleadings and actions as follows:

In Action 5678 (the Los Angeles action) the lower court entered an order on July 22, 1954 in which it ordered and adjudged that this action was severed from Action 5421 and was

no longer consolidated with 5421. It further ordered and adjudged therein that Action 5678 "shall be, and it is hereby dismissed for lack of jurisdiction • • •." Thereafter, and on or about August 2, 1954, a motion was filed by First Federal Savings and Loan Association of Wilmington, Association and First Federal Savings and Loan Association of Bellflower for partial new trial in 5678 and to set aside the dismissal of Los Angeles action No. 5678 under the aforesaid order of dismissal dated July 22, 1954. This motion was noticed for hearing October, 1954. On November 12, 1954 the lower court entered an order which, inter alia, denied the aforesaid motion for partial new trial and to set aside the order dismissing the Los Angeles action. The Los Angeles action thus stands dismissed by the order of July 22, 1954. Reference is made to this adjudication of dismissal of the Los Angeles action by reason of the prayer (paragraph 1) in the petition before us for an order of this Court dismissing this action. Such action by this Court is no longer necessary.

In original Mallonee action 5421, a motion was filed August 30, 1954, for leave to amend to state jurisdiction. This motion seeks to replead and relitigate the third party complaint and cross-claims of Association and collaborating parties which were ordered dismissed by paragraph 2 of this Court's mandate of May 21, 1953. It was noticed for hearing November 29, 1954.

In original Mallonee action 5421, a complaint and application for declaratory judgment, injunction, and other relief was filed on August 30, 1954. This complaint was purportedly filed under the Housing Act of 1954 and incorporates by reference *all* the pleadings heretofore filed by Respondent parties in original action 5421, including specifically the prayers for relief contained in *all* such pleadings.

In action 15,588 an amended complaint was filed August 30, 1954, which is substantially the same in form, substance, and relief sought as the complaint filed on the same date in action 5421, noted in the paragraph above.

The foregoing enumeration is far from a complete showing of the large number of recent actions and proceedings in this now hopelessly tangled web of litigation, but it serves to indicate the clear and inevitable course the litigation is taking. The large

number of collaborating Respondent litigants have been and are continuing to introduce into the stream of the litigation a veritable flood of pleadings in new actions wherein they stoutly reassert contentions advanced by them in the earliest stage of the controversy. The great length and repetitious nature of these pleadings has become a marked characteristic of the litigation in its present form.

As we pointed out (footnote 3) Respondent litigants vigorously assert that they are entitled "to go ahead with what you [they] are attempting to do," and further, that they are entitled to "proceed with *any* affirmative action that they thought they should have in the proper jurisdiction." These are frank avowals and leave nothing to guesswork as to what they are now doing, and what they intend to continue doing in further complicating litigation which started in 1946.[8] Our comments

[8]Some interesting sidelights on the size of the record (June 29, 1954) appear in the comments of Respondent District Judge in his opinion reported in Federal Home Loan Bank of San Francisco v. Long Beach Association, 122 F. Supp. 401. His opening statement in this opinion is enlightening. He there states: "This **octopean litigation** is again before the court in connection with the subject matter of eleven undecided matters **in** case No. 13,979." On page 408 of this opinion the judge made this further enlightening comment: "Any consideration of any of said [11] matters must be had in the light of proceedings heretofore in it and related matters, **(actually about 60 different lawsuits under only three numbers), only a portion of which have found their way into the reports.**" To this appraisal the court appends the citation of the various reported cases dealing with this litigation and further observed (p. 408) that "it would be well to describe at this point the situation giving rise to that phase of this, and related, litigation **which long ago reached the quagmire stage.**" (Emphasis ours.)

With new cases being rapidly filed in which all of the old issues of 1946 are revived and asserted to be now open (or reported) for adjudication, it is certain that the problems now present will multiply until they outrun the capacity of the courts to bring any sort of order out of the chaos and confusion thus being engendered. At the present time the bulk of the records makes it utterly impossible to adequately describe the scope of, and the demands voiced in pleadings in the many actions now in the files of this and the lower court. As a matter of fact it is almost impossible to locate certain motions, orders or pleadings in the vast array of records in this litigation. In truth and in fact it has absorbed unto itself the peculiar expanding characteristics of a Banyan tree. In argument on the petition, counsel for Respondent litigants frankly characterized it as "already fantastic," and we have pointed up

on action 15,588 in its relationship to the issues present in every phase of this controversy emphasize a situation that can and will produce litigation extending over many years to come.

If further doubt remained concerning the intention of Respondent litigants to continue litigating all of the issues posed in 1946, it was completely dissipated by a frank contention in their brief that "in action 5421 [the original Mallonee action] there are many other independent cross-actions, interpleaders and interventions, unaffected by the prior judgments or mandates."

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in our opinions that its unique and unprecedented pattern is without a counterpart in the books. No reported case or controversy has been called to our attention which even remotely resembles it.

In our Mallonee opinion (196 F. 2d 336 at 369) of April 2, 1952, we were required for the first time to examine the full record which even then was reaching appalling proportions. We there pointed out that the litigation had brought within its orbit fifteen proceedings in state and federal courts. We amplify that comment by noting here that the United States Supreme Court has written two opinions in the matter and has denied nine petitions for certiorari of Long Beach and collaborating parties. This Court has already considered seven appeals and has rendered three opinions of which the first two exhaustively treated every phase of the litigation and recognized the complexities with which the case has been interlarded. Notwithstanding the painstaking examination of the many contentions made by Long Beach and their rejection in the three opinions of this Court, the litigation continues to expand with the same contentions being still urged either in the consolidated or in some "related case," or in some new case with a different caption but involving all of the essential elements and vital issues of the same old 1946 controversy between the same parties, a controversy that up to this time has commanded the attention of the courts for nine years.

Small wonder that several years ago one of the great lawyers of the West Coast expressed sympathy for court and counsel who were called upon to wrestle with the "extremely complicated and unique" problems in the litigation (in its 1950 posture). See footnote 2 of O'Melveny & Myers opinion where he spoke of the fact that at that stage to meet the legal problems would "tax anybody's legal ingenuity." The lower court also emphasizes what Judge Morrow had to say. See his comment in Federal Home Loan Bank of San Francisco v. Long Beach Association, 122 F. Supp. 401, 480.

It is our considered judgment that it would be impossible to find in the books a more unique, confusing and extraordinary pattern of litigation or one more shot through and through with "exceptional circumstances." Counsel for Respondent litigants was modestly restrained when he characterized the present record as "fantastic." The cold fact is that its astounding proliferations have finally created a record of overwhelming and unmanageable size.

Among these are a cross-claim in interpleader of George Turner; a complaint in intervention of John D. Willhoit; a cross-claim in interpleader of First Federal Savings and Loan Association of Bellflower; a complaint in intervention of Home Investment Company to clear titles to 174 homes by a deposit of $800,000 in court; and 50 additional home owners' interpleader interventions depositing hundreds of thousands of dollars in court to clear titles to 480 homes. (See our later comment on a "disclaimer" by San Francisco Bank of any claims it might have against the real property here referred to in the two last noted interventions.)

We have herein referred to the fact that in at least one of the "new actions" there is a prayer for declaratory relief as to *all issues raised in the original "consolidated actions"* and in the note action the prayer for relief incorporates all the prayers for relief in *all* former pleadings *in the consolidated actions.* Thus the current complaints on their face tender as issues every issue passed on by this Court (and later before the Supreme Court on certiorari) in the "consolidated actions" covered by our opinions therein and by our mandate of May 21, 1953.

Early in this opinion we adverted to the fact that beginning with October 12, 1953, the lower court commenced a series of hearings lasting eight days upon request for affirmative relief inconsistent with the opinions and mandate of this Court issued in the consolidated cases on May 21, 1953. An examination of the transcript covering the eight days of hearings (a copy of which is before us) will disclose that much of the time was there devoted to arguments that this Court *erred in its mandate.* If arguments of this character had any merit whatever they should have been (but were not) addressed to this Court.[9]

The district court's opinion on mandate, reported in Mallonee v. Fahey, 117 F. Supp. 259, indicates that further delays would be encountered in the complete termination of the original "consolidated actions." Such delays in fact occurred. It will be observed from an examination of the lower court's said opinion

[9]John Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 91; Rogers v. Consolidated Rock Products Co., 9-Cir., 114 F.2d 102, 111; Rothschild & Co. v. Marshall, 9-Cir., 51 F.2d 897, 899. Respondent litigants point out in one of their briefs that none of the parties to the litigation has sought amendment, modification, or change "in that judgment" (referring to our Mallonee opinion).

(117 F. Supp. at 266) that counsel for petitioners herein were criticized by the lower court and opposing counsel for seeking to have that court act with alleged undue haste in giving effect to our said mandate. On this page of its reported opinion the lower court makes note of the then enormous size of the record. The court there pointed out that at the time the mandate was offered for spreading there was still pending and undecided a petition for rehearing before the Supreme Court. (The petition for rehearing was denied by the Supreme Court on June 9, 1953, 345 U.S. 978 and the lower court indicates that this fact was not brought to its attention until some time later.) Several times the suggestion was made that no harm would be done by delaying entry of orders on our mandate to permit further hearings and consideration of collateral matters. (117 F. Supp. at 272, 278.)

Incidentally it will be noted from the lower court's opinion (p. 270) that the court entertained no doubt concerning its duty in connection with the mandate. It frankly states that the duty of the court was to carry out the mandate "without attempting to question the correctness of either the Appellate Court's opinion or decision or the correctness of the mandate." It held that the duty of the lower court was to recognize the mandate as completely controlling as to all matters within its compass. It went on to state, however, that on remand the trial court is free to pass upon any *issue which was not expressly or impliedly disposed of on appeal.*

As to the duty of the lower court to consider and give due weight to the holdings in the opinions of this Court, we refer to the views it expressed in reference to such holdings. In its opinion in Mallonee v. Fahey, 117 F. Supp. 259, 266, the court adverted to its lack of opportunity "to again read and study the opinions of the appellate court and *in light of them* endeavor to make such orders *as in conformity with them*[10] and according

[10]In a recent hearing in this Court, in which the writer participated, there was under discussion the weight properly to be given to an opinion of this Court and the mandate thereon. In passing upon this question the district judge (who is Respondent District Judge in the instant proceeding) stated a principle which we regard as hornbook law by expressing the view that "the mandate there says according to the opinion, and all of the cases say that the opinion is part of the mandate." In enunciating this doctrine the court was merely voicing a rule long established in the decisions that the opinion of an appellate court is deemed to be

to right and justice and the laws of the United States ought to be had * * *." And again at page 270 of this opinion the lower court stated: "There can be no doubt concerning the duty of this court in connection with the mandate. It was ordered spread and under the decisions it is my duty to carry it out without

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incorporated in and become a part of the mandate issued pursuant to that opinion.

Long ago the Clerk of this Court (in the third edition of his Manual of Federal Appellate Procedure) pointed out (pp. 240, 241, 242) that the opinion and decree of an appellate court is final and conclusive in every point actually decided, and a direction to proceed in the trial court "in accordance with the opinion of the appellate court" has the effect of making the opinion a part of the mandate. He cites the Gulf Refining case, 269 U.S. 125, 135, noted below.

The lower court was quite correct in recognizing and giving application to this principle. We also set out a brief reference to a number of holdings of appellate courts dealing with the above noted principle and further indicating that their mandates must be **construed** in the light of their opinions.

Counsel appearing at the hearing on the instant petition on behalf of Respondent District Judge made plain his view that the District Judge was justified in looking principally to the language of our mandate of May 21, 1953 for guidance; that there was no need for the Judge to resort to our opinions since they only directed dismissal of one action (No. 5678, Los Angeles action) and pleadings in another action (5421, Mallonee action). He agreed that it was "generally true" that expressions in an opinion were not "meaningless," and that an appellate court must interpret its own mandate. As respects the delivery of impounded funds to San Francisco Bank (under our mandate) he agreed that if when deposited in the registry of the lower court, the impounded property (here involved) was **then** burdened with any claims, defenses or infirmities, this court did not **intend,** by the use of language in its mandate reading "without charge or impairment," to wipe out such "burden" and permit San Francisco Bank to unconditionally get back these funds without receiving them subject to such prior "infirmities," and that **this** was the meaning the lower court attributed to our mandate.

Predicated on what we regard as a wholly untenable assumption regarding our "meaning" and "intent" (as expressed in the mandate) the lower court ordered the "reimpound," or "transfer" of the impounded funds to action No. 13,979 in which action Association is now directly challenging the right of San Francisco Bank to receive delivery of the funds as we directed in our mandate. It is sufficient to say that the lower court erred when, as above noted, it attributed to our mandate a meaning and **intent** not shared in any degree by this Court. Our view is directly to the contrary.

There is ample precedent in the cases to sustain the principle that an opinion of an appellate court is to be consulted to ascertain what was in-

attempting *to question the correctness of either the appellate court's opinion or decision or the correctness of the mandate.*" And again at page 273, the lower court stated: "*As indicated, the opinion of the appellate court was carefully prepared and likewise the mandate.*" On the same page of the opinion it refers to "certain occasional phrases in the opinion in 12,511" respecting lack of jurisdiction of action 5421 (Mallonee case). Again at page 275 of the opinion the lower court stated: "I therefore conclude that from the two opinions and the mandate [consolidated mandate of May 21, 1953] that the appellate court

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tended by its mandate and that **questions** considered and decided in the opinion of the court are not to be reexamined in any subsequent stage of the same case. The substance of controlling opinions clearly points up that the opinion is part of the mandate and that proceedings on the mandate in the court below must be in conformity with the opinions and judgment of the appellate court. It is clear also from the theory enunciated in these controlling cases that where an appellate court in its mandate prescribes that the lower court should "proceed in accordance with the opinion," this pronouncement operates to make the opinion a part of the mandate as completely as though the opinion had been set out at length. The construction of the intent and meaning of an opinion of the appellate court is not a matter for the exercise of judicial discretion by the court to which the mandate is directed. Respecting application of the foregoing principles see such cases as Gaines v. Rugg, 148 U.S. 228; In re Sanford Fork & Tool Co., petitioner, 160 U.S. 247; Metropolitan Water Co. v. Kaw Valley, etc., 223 U.S. 519; Gulf Refining Co. v. United States, 269 U.S. 125; Roger v. Hill, 289 U.S. 582; Christoffel v. United States, 214 F.2d 265; Ohio Oil Co. v. Thompson, 8-Cir., 120 F.2d 831, cert. denied 314 U.S. 658; Independent Nail & Packing Co. v. Perry, Judge of Dist. Court, 7-Cir., 214 F.2d 670; H. P. Coffee Co. v. Reid, Murdock & Co., 8-Cir., 60 F.2d 387; Mortgage Loan Co. v. Livingston, 8-Cir., 66 F.2d 636; Ex parte The Union Steamboat Co., 178 U.S. 317.

At an early date (1838) the Supreme Court announced a rule which has never been abandoned. In Ex Parte Sibbald v. United States, 12 Peters (U.S.) 488, 491, 493 it had this to say: "Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by **the decree** as the law of the case; and must carry **it** into execution, according to the mandate. They cannot vary **it**, or examine **it** for any other purpose than execution; nor give any other or further relief; nor review **it** upon any matter decided on appeal, for error apparent; nor intermeddle with **it**, further than to settle so much as has been remanded." (Emphasis ours.)

Other phases of the problem where **decisions** of the reviewing court are involved are considered in Butcher & Sherrerd v. Welsh, 3-Cir., 206 F.2d 259; In re United States, 5-Cir., 207 F.2d 567.

did not *intend* that action 5421 should be dismissed." (The emphasis in these quotations is ours.)

At a later point in the opinion we shall refer to specific holdings set out in the opinions of this Court which the lower court is here discussing.

THE BASIC ISSUES

At the hearing on the instant petition the fundamental issues for consideration were given a thorough airing and clearly delineated by argument and by references of counsel to pertinent parts of this complicated record. As we understand the argument of Respondent litigants it is that our opinions and decisions failed to decide any of the vital and material issues in the *entire* litigation, and that they have a right to prolong all aspects of the litigation by relying on their pleadings in the original Mallonee action, with amendments to show jurisdiction under the Housing Act of 1954, and upon the allegations in the pleadings in the "new actions" we have noted, with jurisdiction also resting on the cited language of the said Housing Act. On this theory there must be complete relitigation of *all* of the issues present during and since the early stages of the entire controversy (including the issues in the Los Angeles action and the issues disposed of in our O'Melveny & Myers opinion). Two basic contentions are wrapped up in this theory, and briefly stated they are (1) that our Mallonee opinion really decided nothing except a jurisdictional point coupled with a requirement as to exhaustion of tendered administrative remedies, (see footnote 3) and (2) that certain specified language in the Housing Act of 1954 (see footnote 6) "amend or repeal the basic sections of the Home Loan Bank law upon which the petition for writ, *and all prior opinions* of the Court of Appeals were founded." Grounding their case firmly on this postulate these litigants assert that the cited provisions of this Act have "made *all issues* of Petition for Mandamus, Injunction, etc., Moot"; that the Act "is immediately applicable to these pending writ proceedings, and to all pending litigation in the District Court • • • [that] timely motions for new trial and motions to amend pleadings to show jurisdiction, based, among other grounds, upon the Housing Act, are pending, and yet undecided before the District Court. Also new actions, filed after [its] enactment, and

under [its] express terms are in customary process of coming before the trial court for hearing." (Emphasis ours.)

In oral argument counsel also urged that "the new actions" are filed under, and with "express reliance on, the said Housing Act." As to the legal effect of the Congressional language in the Housing Act of 1954, it was urged that it is our duty to agree with his conclusions because "I think *this* [Section 818 (see footnote 6)] is the most sweeping *general application language* that could be *incorporated into a considered Act of Congress.*" (Emphasis ours.)

In a brief filed by Respondent litigants they argue that the "remedial curative" language of the amendment relied on "was enacted [among other reasons] to remedy the glaring defects in statutory law disclosed by the Court of Appeals opinions • • • [and petitioners] persist in their attempts *to enforce the now repealed statutes*" by demanding mandamus and injunction to prevent the District Court from hearing amendments to pending actions, including "new actions" commenced in August, 1954 under the "original jurisdiction" and under rights conferred in the Housing Act. Thus a "new situation" exists which must be considered by the District Court, and enjoining respondents would "subvert the spirit of the three prior opinions" of this Court. They further urged that "all these [above noted] occurrences *since* the filing of said petition for writs, renders consideration thereof *now*, wholly inappropriate; [that] the Court of Appeals will be faced with complicated issues of fact requiring weeks of testimony, and with application of entirely new law • • • to facts and pleadings subsequent to the record on prior appeals which closed four years ago [June 1950]." (Emphasis ours.)

Upon the basis of the argument just above noted we are urged to hold that the specific language used in the Housing Act which Housing Act amended the Home Loan Bank law, makes the Bank law (as so amended) *retroactive* in character and effect and thus applicable to *every phase* and period of the long litigation with which we here deal despite the fact that the vital issues in this litigation have been the subject of many past decisions of this Court and of the Supreme Court. It is urged that this *amending language* clearly reveals a Congressional in-

tent and purpose to declare by statute that *all of the original actions* in this extensive litigation must now be regarded as "still pending" in the lower court, hence *all* of the vital issues posed therein since the inception of the litigation must be relitigated and/or adjudicated in the lower court. Upon this assumption it is argued that we should not enjoin the exercise of the (therein) "expressly conferred jurisdiction" of the lower court to now decide all of these "pending cases" on the merits.

We think that our appraisal fairly summarizes the basic issues as reflected in the arguments of Respondent litigants.

All of the foregoing arguments of litigants would seem to be predicated upon the assumption (and burdened with its necessary corollary) that the cited language in the Housing Act swept into the discard the principle of res judicata which from time immemorial has attached to decisional holdings in opinions of federal courts on questions of law and fact. But counsel for Respondent litigants will not take that advanced position and on this point carefully narrows his argument. As to this problem he was asked from the bench if he thought Congress "tried to set aside the final judgment of the Court of Appeals" to which he answered "of course not, but the final judgment • • • only went to jurisdiction. They didn't go to merits." Because of its importance we recur to this matter at a later point. (And see other aspects of the same argument in footnote 3.)

The argument of litigants concerning our duty to retroactively apply the specific language here in question meets a challenge in the fact that nowhere in this language is found even a vague reference to a decision of any court which is to be affected by the language. But we are told in a very frank argument that Congress was purposefully trying to blot out the effect of the several decisions of courts dealing with this litigation. No explanation or argument has been tendered as to why this legislative language made no mention of this long controversy and the court decisions affecting it.

In discussing the argument concerning retroactive effect of the cited language, counsel for petitioners herein (in asking for a double remedy, injunction and mandamus) argued that the mere fact that this amendatory language prescribes that the Home Loan Bank Board is *now* made a suable entity affords no basis

for permitting Association to relitigate every phase of this litigation. He pointed out that our decisions holding the lower court to be without jurisdiction were not based on the fact that the Bank Board was not a suable entity; that our opinions were much more basic in that we held that the district court *lacked jurisdiction of the subject matter of the actions;* that now giving one of the defendants in the original actions (Bank Board) capacity to sue (which it did not previously have) certainly does not cure the basic defect in the district court's lack of jurisdiction of the subject matter in the original actions. He pointed out that the cited amendments to the Home Loan Bank law put in additional provisions with respect to the appointment of conservators by the Board and provided in substance that (now) the Board may not appoint a conservator of Federal Savings and Loan Associations except after notice and hearing, *in accordance with the Administrative Procedure Act,* subject to judicial review as provided in that Act. He argued that it is "perfectly obvious" that the amending language here relied on by litigants deals with any *future* appointments of conservators which the Home Loan Bank Board may desire to make and certainly does not even purport to deal with the appointment of a conservator nine years before this amendment was passed and some seven years after the conservator went out of office, all of which emphasizes the obvious purpose of the amendment to "incorporate a new procedure which the Bank Board must [now] follow."

In short, his stated position was that the statutory language is made applicable to "any future appointments of a conservator; that in any event the judicial review provisions, *now for the first time put in this statute,* provide for judicial review *after administrative hearing and decision,*" to which he added that "there has not yet been and there never has been any administrative hearing and decision with respect to the appointment of a conservator [Ammann] of Association nine years ago"; so that even by the most strained construction one were to say this statute was deemed to have a retroactive effect, still, it does not confer *any present jurisdiction* in the courts for the simple reason that jurisdiction is only after the termination of administrative action which has not occurred in this case. Counsel summarizes his argument by the blunt statement (with which we wholly agree) that "there is nothing in the language

of the [Housing] Act which indicates any intention to open up what this Court has decided." (Emphasis ours.) And see comment in our O'Melveny & Myers opinion (p. 454) that the Board was not (then) a suable entity.

We therefore reject as untenable the argument that the amendatory language in the Housing Act (even under the most restrained construction) should be accepted by us as a retroactive vesting of jurisdiction in the lower court to continue to entertain and to try actions instituted by Respondent litigants after this Court had formally held the lower court to be without jurisdiction to entertain said actions and further held that the said court should have dismissed these actions. (See later comments on holdings in our opinions.) We are in complete agreement with the argument of counsel for petitioners herein that the language in question should and must be regarded as purely *prospective* in its application. We are further convinced that the language used in no wise reflects an intention of Congress to reach back and nullify the finality of the several decisions of this Court in the past years in which we directly passed upon and adjudicated issues of law and fact formally before us on appeals regularly taken.

In dealing more specifically with the issue of retroactivity in relation to its effect on our decisions, counsel for litigants herein narrowed his contention, as we have noted above. As to these decisions he assures us that he was not assailing or trying to undermine the doctrine of res judicata; nor was he contending that the language was intended to wipe out decisions of this Court. His theory is that since the amendatory language *shows* that it is intended to be retroactive in effect, it becomes our duty to follow this congressional mandate which is so clearly *shown*, and apply this theory to *all* of the actions initiated by litigants (including the "new cases" and procedures above noted).

We have continued to stress this crucial aspect of the argument of litigants since it reaches to the heart of all the arguments before us. It is upon this hypothesis that counsel concludes and argues that as a matter of law *all of the material issues in all of the actions from the very beginning of the litigation* are still *"pending for trial on the merits"* in the court of Respondent District Judge, therefore the petition of petitioners must be denied.

So much for comment on what we regard as the most basic issue or issues now before us although these are embraced within the orbit of many other contentions and issues.

An excellent illustration of the breadth and significance of the claim of *pendency* of even the very earliest actions filed in this litigation, Nos. 5421-Mallonee action, 5678 Los Angeles action) is provided by a statement in litigants' brief that they are also "defendants in two consolidated actions in the District Court (Nos. 5421-5678)." This is directed to the legal right and necessity of *litigating all over again the issue whether the assets of Los Angeles Bank were "unlawfully seized" in 1946 under Board orders.* (See our O'Melveny & Myers opinion.) There can be no misunderstanding or doubt as to their exact position since their brief and oral arguments make abundantly plain that they squarely stand upon the contention that *all previous reported decisions of this Court* which dealt with and disposed of contentions respecting the legal rights of *all* of the various Respondent litigants who were drawn within the orbit of the so-called Mallonee case during the long course of this involved litigation are now (so far as concerns any and all of the said rights of these Respondent parties and litigants) completely devitalized by the noted language in the Housing Act.

And they appear to include within the sweep and thrust of this argument all that this Court said in its O'Melveny & Myers opinion concerning the issue of the statutory relationship existing between the Federal Home Loan Bank System and Association (and similarly situated institutions). *That issue* must be litigated again under their theory of the meaning of the Housing Act language.

THE DISCLAIMER ISSUE

The brief of Respondent litigants suggests the presence of an issue arising out of a so-called "disclaimer" *filed in the "note case"* (13979) by San Francisco Bank. In a 148 page opinion of Respondent District Judge (Federal Home Loan Bank of San Francisco v. Long Beach Federal Savings and Loan Association 122 F.Supp. 401) he granted summary judgments against petitioners herein *quieting the titles* of 8,000 home owner borrowers who had been brought into the old 1946 Mallonee case. (Save and except to a reference below to an earlier comment of Re-

spondent District Judge to the *"disclaimer"* which appears in his opinion in (Mallonee v. Fahey) 117 F. Supp. 259 at 292, our comments here will refer to specific pages in 122 F. Supp.)

As litigants' counsel pointed out, the judgments "are based upon, among other things, written disclaimers made by petitioners • • • and recorded in the Los Angeles County, California, Recorder's Office, and filed by petitioners with the U.S. District Court in their own foreclosure action." This problem arose out of the fact that these original 8,000 "home owners" were borrowers from Association and the facts concerning them were the subject of comment in our Mallonee opinion, 196 F.2d 336, 369 and need not be repeated here.

In the above noted opinion of the Judge he discusses (pp. 409, 417, 422, 423, 428, 429, 433, 445) the facts and issues concerning the "disclaimer" of San Francisco Bank and refers to it as being, in effect, a "quit-claim deed." On p. 417 the judge set out the text of the "disclaimer" and held that "the effective date of the disclaimer was the date of its filing in this action, viz., January 18, 1954." And see further comment of the judge (p. 429) that "the end result of the disclaimer was to quiet the title of the home owners"; also his other comments on the pages we have noted as to the conclusive effect against San Francisco Bank of the "disclaimer" so far as concerns any later claim that bank might attempt to make against the real property involved.

As indicated, the Bank's disclaimer appears to have been filed in court *in* the records of pending case No. 13,979 in which action Association was claiming that titles of the "home owners" were "clouded" by contentions of San Francisco Bank hence the validity of this alleged "claim" of San Francisco Bank was an issue yet to be litigated in the lower court.

And see the earlier comment of the lower court in Mallonee v. Fahey, supra, p. 292 showing that as of that time the lower court assumed that the original of the disclaimer of San Francisco Bank would properly "be filed in action 5421 [original Mallonee action] or 13,979." He added the statement that "it is on its face a disclaimer to the real property involved in *all* trust deeds deposited in court in action 5421-5678 [the original Mallonee and Los Angeles actions and] I shall examine it and if it meets the

requirements of the mandate [of May 21, 1953] as construed by the above memorandum, I shall promptly make the order for the return [to San Francisco Bank] of the collateral." (Emphasis ours.)

In the opinion of the lower court in 122 F. Supp (pp. 435-436 and 439) it directed that summary judgments be entered in the note case (13,979) quieting title against claims of San Francisco Bank and A. V. Ammann, former Conservator, and Bramley, his deputy, in favor of the so-called home owners, Title Service Co. and Association, to the individual borrowers' notes and deeds of trust pledged to San Francisco Bank as collateral security, the real property covered by the deeds of trust, and "the money received by it [Association] from the 'home owners' on the described notes and trust deeds." The breadth of this order would appear to include all of *the money* now on deposit in the registry of the court, and if it be thus construed, such summary judgments would contravene the mandate of this Court issued May 21, 1953. So far as this record indicates, neither Ammann nor Bramley, his deputy, has ever claimed any title to or interest in any of the said assets, this for the reason that Ammann and his deputy were simply managers of Association during Ammann's tenure as Conservator.

In the noted opinion the district court (pp. 429, and 436) directs judgment quieting the title of Association "to the *money* received *from* the home owners on the trust deeds and notes which were paid *after* the commencement of the within litigation and *prior* to January 18, 1954." The court refers (p. 429) to the "effective date of the disclaimer" as being January 18, 1954. The "money" which the district court proposes to absolve from any claim of San Francisco Bank appears to *include* the funds impounded in the registry of the court *in the consolidated actions* to which San Francisco Bank must look for recovery for a substantial portion of its collateral, and in this connection San Francisco Bank points out "that practically all of the *funds* now in court were paid by borrowers upon notes which were originally held by San Francisco Bank as part of its collateral." An order had been made by the district court impressing a lien *on said funds* for the benefit of San Francisco Bank, and under the mandate of this Court the bank was entitled to receive *out of funds on deposit in the court* a large sum as collateral security.

This mandate (of May 21, 1953) was issued *in the consolidated action* and under its terms San Francisco Bank was clearly entitled to forthwith receive delivery of substituted collateral *from the funds now in court,* and we so hold. We express this conclusion because the judgment proposed to be entered in the lower court in the related "note case" (13979) would be a flagrant transgression of this mandate. Under such a judgment San Francisco Bank would be deprived of all interest in those *funds.*

In this connection it must be noted that the funds (covered by our Mandate of May 21, 1953) were originally impounded in the registry of the lower court during the early stage of the Mallonee litigation (in consolidated actions 5421-5678) and were "transferred" and/or "retained" and thus reimpounded *in* "note case" No. 13,979. See comments of lower court at pages 443, 444, 446, where the lower court refers to the necessity of "retaining" these impounded funds due to "the complexities of this litigation," and a "change of conditions." At pages 409 to 413 of the opinion the lower court also discusses three documents executed by Ammann *to* San Francisco Bank while serving as Conservator for Association, these being (1) a "Subordination Agreement" on May 28, 1946, (2) a "Collection Agreement" on May 28, 1946 and (3) a "Pledge Agreement" on May 20, 1946. In a footnote (p. 409) the lower court points out that "the officers of Long Beach Association had previously executed similar agreements *to* Los Angeles Bank." In default of further information from the parties we can only assume that San Francisco Bank required such protective agreements from borrowing member-associations when in 1946 it lawfully succeeded the abolished Los Angeles Bank under orders of "Administration."

However, Association still denies in pleadings in pending actions that San Francisco Bank is the "lawful successor" of the former Los Angeles Bank despite the fact that in 1946 all of the assets and properties held by Los Angeles Bank were transferred to the newly created San Francisco Bank by and under the reorganization orders of "Administration." The latter bank thereafter continued to exercise all of the functions and perform all of the duties imposed upon it by law which duties had theretofore been performed by the abolished Los Angeles Bank. Under the reorganization orders San Francisco Bank was required to and did assume all of the current and existing obligations and liabilities

of Los Angeles, and it also became bound by all of the statutory obligations of a Federal Home Loan Bank which had previously existed between Los Angeles Bank on the one hand and Association and similar institutions on the other. It was also entitled to avail itself of whatever protection for such a bank as was authorized under the terms and provisions of law and regulations affecting the Federal Home Loan Bank System. In short, San Francisco Bank (as successor to Los Angeles Bank) simply stepped into the corporate shoes of Los Angeles and became bound by all of the duties and obligations mutually imposed upon Federal Home Loan Banks and their member stockholders. So much is the clear holding of this Court in Fahey et al. v. O'Melveny & Myers, 200 F.2d 420.

In addition to the breadth and sweeping character of the language used in the disclaimer, petitioners in the instant proceeding (of which San Francisco Bank is one) have represented to us in their brief in this proceeding that San Francisco Bank "makes no claim against the title of *any* home owner who was a borrower from Long Beach Association." In short, we are assured that the claim of the bank is against the corporation—Association, and not against these "home owner" borrowers who gave notes and trust deeds to Association as security for loans on these properties. Petitioners also advise us that they have given the same formal assurance to the lower court and to the Supreme Court. In the disclaimer (p. 417 of the above noted opinion of district court) it clearly appears that San Francisco Bank was not waiving any claim *against Association* since the disclaimer contains the following provision: "The undersigned, by these presents, does not waive, release, discharge, postpone or in any manner impair any of its rights as against said Long Beach Federal Savings and Loan Association or the property and assets thereof, but to the contrary expressly reserves all such rights." (Emphasis in all above quotations is ours.)

Concerning the question of the effect of the bald and sweeping "disclaimer" filed by San Francisco Bank we find nothing in the record which carries or justifies a legitimate suggestion or inference that San Francisco Bank might or could hereafter assert (with any possible lawful basis) some sort of claim which would cloud, or tend to cloud, the titles of the individual owners of the real property here specifically referred to. In its above noted

opinion (p. 417) the lower court points out that the "disclaimer" of San Francisco Bank was not only filed in pending action 13,979, but was also filed and recorded in the official (real estate) records of Los Angeles County on November 30, 1953 (the County in which the real property was located) and that the disclaimer was officially approved by the Board of Directors of the Bank. That this sort of public record completely ties the hands of San Francisco Bank seems more than obvious, and we are thoroughly convinced that if any court was hereafter confronted with this record it would be more than justified in bluntly refusing to entertain, or tolerate, a suit by that Bank in which it sought, directly or indirectly, to assert any claim against or interest in the said real property of these individual "home owners" if the claim arose out of the transactions here referred to and which were discussed in our Mallonee opinion. So much for the "disclaimer."

THE WALKER CLAIM

In passing we point out that in a letter to this Court under date of July 15, 1954 (copies of which letter were sent to counsel for all Respondent litigants) counsel for San Francisco Bank emphasized that this Bank claims and has a lien upon all Government bonds in the registry of the court and upon all of the cash and funds therein *until* actually delivered to San Francisco Bank in the total sum as provided in paragraph 3 of our mandate of May 21, 1953. We refer to this letter because it also discusses the claim of Ronald Walker for fees claimed to be due him for services as a Special Master. This claim deserves attention at our hands because of its somewhat uncertain status in this litigation. (See our Mallonee opinion (p. 369) where we made reference to his appointment as Special Master.)

In this letter counsel for San Francisco Bank also advised that Mr. Walker had asked them to inform this Court that a then proposed order specifically provides for payment to him from funds on deposit in court "against which no claim or lien is asserted by the Federal Home Loan Bank of San Francisco, or any other party," and that the order proposed by him concerning his fees as Special Master would be executed concurrently or subsequent to an order delivering the funds from the registry of the

court *to* San Francisco Bank pursuant to the mandate of May 21, 1953.

In fairness to all parties the position of San Francisco Bank (as we understand its position) in respect to the Walker claim for allowance of a fee should be made plain because of the bearing this claim has on the disposition of the impounded funds. The immediate problem arises out of the following facts.

On July 22, 1954 the lower court entered an order in the original Mallonee action 5421 directing that the sum of $87,500 for fees to Ronald Walker and an additional sum of $8,108.31 for his expenses should be taxed as costs in the Mallonee action and against the funds of Association on deposit in the registry of the court. As against this allowance a credit of $75,284.18 was allowed Association for funds previously paid to Walker *from its funds* on deposit in the registry of the court. The order of the court directed the clerk of the court to pay to Walker, as Special Master, the sum of $20,324.13 from funds on deposit in the registry of the court *belonging to Association.* This seems to be the order with which we are here concerned.

Prior to the entry of the order here noted, San Francisco Bank had objected to the entry of such an order. On September 16, 1954 the lower court entered an order in (Mallonee) action 5421 "severing" the funds on deposit in the registry of the court. After reciting therein the provisions of paragraph 3 of our mandate of May 21, 1953, the court said:

> "In order to carry out the terms of the mandate, and in order to permit an orderly disposition of the funds and properties on deposit in Court, whether claimed by Federal Home Loan Bank of San Francisco, Long Beach Federal Savings and Loan Association, or others, the said U.S. Government bonds in the face amount of $5,300,000, and their attached coupons, and cash in the sum of $994,865.01, plus 14 cents per day from and after August 3rd, 1953, plus said conservator's notes in the face amount of $6,300,000, be, and are, *severed* from all other property and cash now on deposit in the registry of this Court, and the Clerk is hereby ordered and directed to hold the same under a separate account, on his books in the within action, to the credit of the Federal Home Loan Bank of San Francisco and/or Long Beach Fed-

eral Savings and Loan Association, pending further order of this Court." (Emphasis ours.)

Concerning the said order of September 16, 1954 (and prior to the entry thereof), San Francisco Bank had advised this Court and all counsel for Respondent litigants by the above mentioned letter of July 15, 1954 that the order of *severance* then being proposed provided for payment to Ronald Walker from funds on deposit in the court "against which no claim or lien is asserted by San Francisco Bank or any other party." In this letter San Francisco Bank pointed out that it had filed objections to such an order, and (as above indicated) made plain the precise nature of its claim of lien on the impounded funds. The Bank further asserted therein that the Clerk of the District Court was without authority in law to make *a severance* of the funds in the registry *or* to make the determinations of fact and law required by the terms of the (then proposed) order; and that no order *invading the said funds* is permissible *until* the aforesaid portion (paragraph 3) of said mandate is carried into effect and fully consummated.

We have no doubt regarding the duty of Respondent District Judge respecting disposition of the impounded funds, insofar as concerns San Francisco Bank. If a doubt exists in his mind it should be dispelled by the clear and simple provisions of the command in paragraph 3 of our mandate of May 21, 1953, a copy of which is set out in footnote 3, supra. He should have promptly complied with this command.

The entire record establishes beyond any question that so far as concerns the immediate question of disposition of the impounded funds, San Francisco Bank is demanding, and justly so, that this impounded property be delivered to it exactly as specified in our mandate. It is also abundantly clear from the record that San Francisco Bank is not here concerning itself with, or making an issue of, the amount (or the source from which derived) of fees that may be paid to Special Master Ronald Walker *provided* such payment does not impair or lessen the amount of property and assets ordered by our mandate to be delivered and paid over to San Francisco Bank. Therefore, it is not necessary to decide any question associated with or relating to any balance of fees, or the amount thereof, which may or should be paid to said Special

Master. Solely by way of comment, we add that this Court perceives no sound reason why his fee, if properly payable, may not be paid from any funds remaining in the registry of the court *after* the claim of San Francisco Bank is satisfied in full pursuant to and in accordance with the express terms of our mandate.[11]

From the foregoing, we conclude and therefore hold and direct that *if* any order or orders of Respondent Judge of the District Court invade such impounded funds to an extent or degree which results in diminishing the total amount of the presently impounded funds and assets below the full amount required to be delivered to San Francisco Bank pursuant to our mandate, Respondent Judge is hereby ordered and directed to forthwith vacate such order or orders, or modify them to conform to the views here expressed.

OUR DECISIONS

It is necessary to keep in mind that the issues we here confront stem from and deal with an aggregate of closely related and highly complicated legal and fact situations which had their beginning in 1946 and which have since continued to give character to the controversy. Litigation over the issues before us in the instant hearing had been proceeding in the lower court for several years before the first appeal (in the consolidated cases) reached this Court with its confusing medley of issues presented in a record which was then of enormous length. Our Mallonee opinion portrays some of the complications then present all of which have been provocative of more litigation.

In our opinions in the two subsequent appeals we were required to meet and dispose of certain issues arising from time-to-time decisions of the lower court dealing with one or more of the many phases of what is really one body of litigation. Of necessity, these decisions were written in light of our holdings in the Mallonee opinion. Furthermore, Respondent litigants have, throughout the entire course of this litigation, vigorously contended that *all* issues

[11]For an illuminating comment by the lower court on the question of allowance of fees to the Special Master see its observations in Federal Home Loan Bank of San Francisco v. Long Beach Federal Savings and Loan Association, 122 F. Supp. 401 at 474, et seq., where it discusses the question of liability for payment of his fees under our several mandates issued pursuant to the Calverley opinion.

therein were so inseparably linked and hopelessly intermingled as to require an overall consideration of all issues when disposing of any part of them. This theory (noted in our Mallonee opinion) is also reflected in the various pleadings in the so-called "new cases" instituted by these litigants.

On the record and the arguments now before us on the petition herein it appears to be the view of Respondent litigants that, save and except as to certain matters not important to our decision here, our three opinions amount to no more than narratives of events and as such entirely void of decisional holdings or pronouncements on the "merits" of any of the vital issues discussed in these opinions. Obviously such a sweeping indictment is intended to include our holding in the Mallonee opinion that the lower court was without jurisdiction and should have dismissed the five actions referred to on page 379 of our Mallonee opinion. We disagree with and reject this theory of litigants respecting the meaning and interpretation to be given the language of the opinions. They dealt with and discussed in detail specific issues before us on those appeals and our holdings on these specific issues were not intended to be so much idle obiter within the total framework of the opinions. To the contrary, we directed them to, and intended them to be dispositive of, the issues with which they purported to and did deal, and under well established precedents they must be deemed to be incorporated into and therefore an essential part of the mandate or mandates issued pursuant to the opinions, as fully and completely as though the opinions were set out at length in these mandates.

And that no doubt should remain concerning the intention of this Court that its opinions and judgments should be incorporated in and be a part of the mandates issued pursuant to these decisions, we incorporated in each of said mandates a specific provision "that such proceedings be had * * * in conformity with the opinions and judgments of this Court." (See footnote 10, supra.) That sort of a requirement would have been worse than useless had we *intended* that our conclusions and holdings should be regarded as mere historical narratives.

And see footnote 4, supra, where we pointed out that when certiorari was sought to review our Mallonee opinion, representation to the Supreme Court in briefs of Association, the original

Mallonee group of litigants and Wilmington Federal Savings and Loan Association emphasized *our holdings* in that opinion concerning absence of jurisdiction in the lower court and our order of *dismissal of the actions.*

We first turn to the holdings and pronouncements in our Mallonee opinion and refer to the pages where they appear in the reported opinion. Excerpts from the two other opinions will be given like treatment. Emphasis supplied in these excerpts is ours.

THE MALLONEE OPINION

Page 349. Three parties in the litigation, to wit, Mallonee (identified on p. 340), Association and Title Service Company were referred to as the "Mallonee-Association group."

Page 365. We here noted that Fahey filed a motion challenging the jurisdiction of the Court over the subject matter of the Mallonee-Association *actions* and over Fahey. This motion was grounded on the claim that the Court was without jurisdiction because Fahey was an indispensable party over whom the Court lacked jurisdiction, and that the complaints of these parties failed to state a claim entitling them to relief. We pointed out that the last mentioned claim was maintained throughout the litigation (and included the complaints as amended in November, 1947). (See also pages 370 and 379 of opinion referring to these amended complaints.)

Page 366. We pointed out that the error of the lower court was in entertaining *the actions* of the Mallonee-Association group prior to a resort to exhaustion of the then tendered and available administrative remedies.

Page 370. We pointed out that appellants in the Mallonee-Association group *actions* continued to maintain their objection to the sufficiency of the original pleadings in these group *actions,* and continued to maintain their objection that the pleadings therein, as amended, failed to state a claim upon which relief could be granted. We *held* that the lower court erred when it then failed to promptly *dismiss these actions,* and that it compounded its original error in entertaining the *actions* of this group of litigants prior to the exhaustion of the administrative process. On the same page we further pointed out that the amendments to pleadings made in November, 1947 failed to provide a

sound legal basis for further entertaining *these actions;* that for sixteen months after the said amendments the court not only entertained the original injunction *actions* of Mallonee, Association and Title Service Company, but continued to pass upon and adjudicate issues based upon their purported claims for relief which claims *had no existence or substance in law* because they failed to present a justiciable controversy.

Page 371. We pointed out that the lower court appeared to be convinced that the decision of the Supreme Court in Fahey v. Mallonee, 332 U.S. 258 cleared away any doubt of the propriety and legality of continuing to entertain *the actions* of Mallonee and Association.

Page 372. We pointed out that possibly some observations of the Supreme Court in Fahey v. Mallonee, supra, may have convinced the lower court that adding the charge of "fraud" to the original Mallonee and Association pleadings justified its procedural course from the beginning of the litigation, a conclusion with which we disagreed.

Page 374. We pointed out that "one simple and controlling issue of law was present" in this litigation—"the legality of the Ammann appointment." We were referring to the litigation embraced in the Mallonee-Association group pleadings. The answers of appellants to all such pleadings alleged, inter alia, that the lower court *lacked jurisdiction* both over the persons of the non-resident defendants, and of the subject matter of *the actions* and that none of the complaints or cross-claims stated a claim for which relief could be granted. We noted at this point that this same defense had been promptly made on the institution of the litigation. All cross-actions and proceedings in the Mallonee action 5421 appear to be based upon the alleged invalidity of the Ammann appointment and we regard these actions as being clearly ancillary (and see our holding on page 379).

Page 379. We again emphasized that the lower court was *without jurisdiction* under the original pleadings of this action, *as amended in 1947,* in that they failed to state causes of action, and added the further statement "and we think it quite clear that the pleadings of the subsidiary and interpleading litigants Wallis and Home Investment Company • • • failed to tender an issue or issues which presented a claim upon which relief

could have been granted by the Court"; that the claims of Wallis and Home Investment Company were part and parcel of the Mallonee and Association contentions and if relief demanded by the "Mallonee-Association group" (see identification of "Mallonee-Association group" on page 349) was improperly and unlawfully granted by the court "it is certain that the ancillary and subsidiary claims of these litigants [Wallis and Home Investment Company] which arose only out of claims of Association, were without substance in law." We further pointed out that "if the claims of Association were untenable in law, it is obvious that the claims of these litigants could rise no higher than their source." Following these comments *we held that the court should have dismissed all of these original five actions* (Mallonee, Association, Title Service Company, Wallis and Home Investment Company) for the reason that they failed to state a claim upon which relief could be granted *and* for the further reason that Association had failed to exhaust tendered and available administrative remedies.

Page 381. While the so-called Mallonee-Association litigation (which also embraced collaborating parties) was before us on an appeal from a preliminary injunction issued in December, 1949, the facts of this bracket of the litigation are really bottomed on two such injunctions both of which enjoined the holding of administrative hearings. All of this clearly appears in our Mallonee opinion where we pointed out that the doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures: it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. (On page 386 of our opinion we point out that it was on motion of five appellees, Mallonee, Association, Title Service Company, Wallis and Turner that the lower court restrained the holding of the second administrative hearing.)

Page 382. We held that after September 11, 1946 the trial court should have refused to longer entertain the Mallonee-Association *actions*, and that it erred when it failed to immediately dismiss *them* on the ground that tendered and administrative remedies were not first exhausted. We added that "failure of the court *to dismiss these actions* after September 11, 1946 merely compounded the original error of the court in entertaining *them*

at the outset of the litigation," in which statement we were repeating in part what we said on page 370 of the opinion.

Page 383. We said: "Upon the whole record we are fully convinced and therefore hold that procedure in the lower court subsequent to the injunction order of July 1, 1946 (including the amendment of Mallonee and Association pleadings under the order of November 10, 1947) did not have the legal effect of vesting jurisdiction in the lower court to entertain *these actions* after September 11, 1946."

Page 391. The last and final holding in the Mallonee opinion appears on this page. Therein we reversed an order of the lower court for entry of a preliminary injunction and directed the court below to vacate and set aside the injunction.

THE O'MELVENY & MYERS OPINION

Page 427-8. "Other appeals now pending in this court also involve these impounded funds which suggest the necessity of identifying their source and nature. The record indicates, and stress is given the fact that this fund arose out of five 'interpleader or intervention proceedings' in the so-called 'Mallonee Case,' supra (which was consolidated with the 'Los Angeles Action' in the main case) each of which interpleader proceedings was based on the presumption that the 1946 order of the Federal Home Loan Bank Administration appointing Ammann as Conservator of the Long Beach Federal Savings and Loan Association *was void ab initio,* and that *every act* performed by Ammann in the management of the said Association was a nullity and therefore subject to collateral attack. These interpleader and/or intervention proceedings in the main case which we describe at this point were instituted by Title Service Company, Robert H. Wallis, Home Investment Company, George Turner and the Long Beach Federal Savings and Loan Association. *All were parties in and to the so-called Mallonee case.* Home Investment Company intervened on July 1, 1946 to secure an order quieting title and to secure reconveyance of 174 deeds of trust which had previously been interpleaded by Title Service Company in its answer and cross-claim in interpleader and which deeds had been deposited in court. Home Investment Company does not appear to be a claimant to the funds here considered."

Page 428. "As to the intervening and interpleading parties mentioned in the preceding paragraph see our opinion in the main case, 196 F.2d 336, 378, 379, wherein we held that the five original *actions or proceedings* instituted by the there identified Mallonee-Association group and Wallis and Home Investment Company should have been dismissed by the lower court for the reason that they failed to state a claim upon which the relief they demanded could be granted and for the further reason that Association had failed to exhaust tendered and available administrative remedies."

Page 429. We again emphasized that the question as to the *validity* of the original appointment of Ammann as Conservator of Association underlies, explains the existence of, and gives decisive character to much of the controversy over the impounded funds.

Page 459. Since in actions of Respondent litigants now pending in the lower court the issues in the so-called Los Angeles action are revived and asserted despite the fact that we ordered the lower court to dismiss that action. On this page of the opinion appears the following pronuncement: "Under the facts and the law and for reasons set forth in this opinion, we are obliged to hold and do hold, that the lower court was without jurisdiction of the subject matter of the Los Angeles action and without jurisdiction in personam over indispensable parties in and to such an action. The lower court improperly entertained this *action* which should have been dismissed when the Commissioner challenged the jurisdiction of the Court."

Page 460. In this opinion we have emphasized the inseparable nature of the issues in all of the actions we are here considering. On this point in the opinion we emphasized that "questions as to liability under the claims of Association thus appear to be inseparably related and linked to the controlling issues in the Los Angeles action."

Page 481. In concluding this opinion we remanded the case before us to the lower court with directions to that court to dismiss the Los Angeles action.

THE CALVERLEY OPINION

Page 199. "The several appeals to which the two motions [above described in the opinion] are directed arise out of litigation which has previously been before this Court and finally disposed of in Home Loan Bank Board v. Mallonee, 9 Cir., 196 F.2d 336, and Fahey v. O'Melveny & Myers, 9 Cir., 200 F.2d 420, certiorari denied 345 U.S. 952, 73 S.Ct. 863, rehearing denied 345 U.S. 978, 73 S.Ct. 1120. This Court there *determined* that the District Court *was without jurisdiction of the subject matter of either of said consolidated actions* and accordingly our mandate, filed May 21, 1953, directed dismissal of the Los Angeles Action (No. 5678-P.H.) and the principal pleadings in the Mallonee Action (No. 5421-P.H.).

"In view of this Court's previous determination that the said *consolidated actions present no justiciable controversy within the jurisdiction of the Federal Court*, it necessarily follows that the District Court *was and is without authority to proceed in these said consolidated actions or either of them or in any collateral matters which are not founded upon an independent basis of Federal jurisdiction.* This Court's previous decisions in this matter require not only the dismissal of the principal pleadings *and proceedings*, but also the dismissal of matters ancillary thereto."

Page 200. "However, there is no necessity for further continuing these appeals. In our previous opinion (heretofore referred to) *it was determined that the lower court was without jurisdiction of the subject matter of the Mallonee Action* and from this it rationally follows that it was improper for the lower court to require the deposit in Court of Government bonds and other collateral securities as to which San Francisco Bank claims a lien. This Court has already directed that there be delivered to San Francisco Bank from the registry of the District Court Government bonds and cash sufficient to restore it as nearly as possible to the position it occupied as a secured creditor prior to the time it was erroneously required to make the deposit.

• • • • •

"Inasmuch as it has been held that the District Court was without authority to proceed *in the said consolidated actions*, the appointment of a receiver was a nullity and the purported re-

ceiver was without power to act. Nor can his expenses (the estimated costs above noted) be paid from funds on deposit in Court. [Citing cases.] Appellants' motion to remand appeals Nos. 13,411 and 13,558 should be granted with directions to the District Court to vacate the orders complained of and to dismiss the proceedings instituted by the purported receiver.

"Where, as here, *it appears that the District Court has no jurisdiction of the subject matter,* it is appropriate to remand the proceedings to the District Court with directions for their disposition. Zank v. Landon, 9 Cir., 205 F.2d 615."

FINAL CONCLUSIONS AND ORDERS

It is clear that Respondent District Judge and Respondent litigants herein have at all times erroneously and wrongfully construed and interpreted the meaning and intent of this Court as expressed in its three opinions and decisions, and mandates issued pursuant thereto. In our Mallonee opinion we held that the lower court was without jurisdiction to entertain the actions of the Mallonee-Association group of litigants and the actions of Wallis and Home Investment Company, and that the court should have dismissed *all* of these original five actions. Despite the foregoing holdings Respondent litigants, by means of the above noted procedures, motions, and filing of new actions in said lower court, have continued at all times to litigate or relitigate therein issues of law and fact tendered in the actions of these Respondent litigants from the inception of this litigation. These procedures are designed to and do frustrate and nullify the said decisions of this Court.

On the whole record it is hereby ordered that, save and except as to a decision of this Court on the issue of remand to a state court of action 13,979 (paragraph 6 of prayer of petition) and dismissal of Action 5678 (paragraph 1 of prayer of petition), the petitioners herein are entitled to receive from this Court the relief prayed for in their petition, and that such relief shall be effected by the issuance of writs of injunction and mandamus, all as hereinafter provided. This Court has power, under 28 U.S.C.A., Sec. 1651, to enforce by such writs a com-

pliance with our decisions in accordance with our intent and purpose as we here construe such intent and purpose.[12]

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[12]The All Writs Section of the Judicial Code (28 U.S.C.A., Sec. 1651 (a)) grants this Court the power to issue writs of mandamus and/or injunction to enforce compliance with or to prevent a nullification or circumvention of its earlier mandate. There is in the record before us a more than sufficient showing of peculiar hardship; the lower court was in error, and it is our view that there is no adequate remedy by way of appeal to correct the grave abuses here shown. In short, this record establishes the presence of all necessary elements to justify the granting of the extraordinary relief to petitioners here prayed for. See United States Alkali Export Association v. United States, 325 U.S. 212; Gulf Research and Development Co. v. Harrison, 185 F.2d 457, 459; Shapiro v. Bonanza Hotel Co., 185 F.2d 777.

It is the duty of the District Court promptly to obey a mandate from the Appellate Court, and its failure to do so can be corrected by mandamus. In the Matter of Howard, 9 Wallace 175. See also Brietson Mfg. Co. v. Woodrough, 284 Fed. 484, where upon a prior appeal the Court of Appeals had held the District Court without jurisdiction to entertain a receivership proceeding and by its mandate had directed the return of property held by the receiver. The District Court had however suspended such return pending hearing of applications for intervention by other claimants. On petition for writ of mandamus the Court of Appeals held that such delay was beyond the power of the District Court.

In Independent Nail & Packing Co. v. Perry, 214 F.2d 670, the court held that the District Court's order staying a judgment entered pursuant to a mandate from the Court of Appeals violated the mandate, and issued a writ of mandamus to put the judgment into full force and effect.

In our Mandate of May 21, 1953, we directed the lower court to perform a specific act, i.e., to return certain notes, bonds with attached coupons, and cash to San Francisco Bank. This order left no discretion in the lower court to do other than conform thereto. Executing the order was therefore a purely ministerial act. Bastian v. Erickson, 10-Cir., 114 F.2d 338, 340, 341. The Tenth Circuit there cites Sibbald v. United States, 12 Peters (U.S.) 488, 491, 492 to the effect that the court below must follow the direction given and has no power to deviate therefrom.

In the Sibbald case, supra, the Supreme Court made clear that after an appeal, the District Court is bound to comply fully with the mandate and opinion of the Appellate Court and is without authority to entertain or take action inconsistent therewith. The Court said: (p. 491) "Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided

Based upon the petition of petitioners and upon full consideration of the record before us and the issues therein presented, this Court does now Order that a writ of mandate issue directed to the said District Court, and to Honorable Peirson M. Hall, Judge thereof, in the words and figures following, to wit:[13]

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on appeal, for error apparent; nor intermeddle with it, further than to settle so much as has been remanded."

The rule announced by the Supreme Court in the Sibbald case was again approved by the Supreme Court in the recent case of Briggs, Administratrix v. Pennsylvania Railroad Company, 334 U.S. 304, 306, where the Court said: "In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court [citing cases, including the Sibbald case]. The rule of these cases has been uniformly followed in later days. [citing cases.]"

"If the District Court fails in this duty, misconstrues the mandate or exceeds its powers by acting in contravention thereof, its actions may be controlled by a writ of mandamus. In re Sanford Fork & Tool Co., 160 U.S. 247, 255; In re Potts, 166 U.S. 263; Delaware L. & W. R. Co. v. Rellstab, 276 U.S. 1; Butcher & Sherrerd v. Welsh, 206 F.2d 259 (3-Cir.); In re United States, 207 F.2d 567 (5-Cir.)."

An appellate court has unquestioned power under 28 U.S.C.A. Sec. 1651(a) to enforce compliance with its decree by directly enjoining action contrary thereto. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426; Harrison Beverage Co. Inc. v. Hunsberger, 65 F.2d 873. See Board of Governors of Federal Reserve System v. Transamerica Corp., 184 F.2d 311, 315, 317. Consult Ferguson v. Ferguson, 189 S.W. (2d) 442 (Tex.) involving a situation somewhat similar to that here considered, certiorari denied 337 U.S. 943.

[13]Attached to, incorporated in and made a part of the Writ of Mandamus herein set forth and which Writ is by this Court ordered and directed to be issued and directed to the said lower court and to the Judge thereof, is a form of receipt marked Exhibit A. The several bonds therein enumerated are specifically described and referred to in several parts of the printed Transcript of Record in case No. 12511, supra, this being the record on appeal to this Court in the so-called "consolidated cases." A careful inspection of the entire record before us, including the Exhibits, noted supra, makes abundantly plain that the enumeration and description of the said bonds set out in said Exhibit A are accurate.

The four so-called "original straight notes" enumerated and described in said Exhibit A are the identical "notes" described in said record on appeal in this Court in said case No. 12511, these being the four notes issued by A. V. Ammann to San Francisco Bank on behalf of Association during the period in which said Ammann was officially serving as Conservator of Association.

We take judicial notice of the fact that the nine agreements and docu-

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. MCALLISTER and WILLIAM K. DIVERS, as members of the Home Loan Bank Board; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation, *Petitioners,* vs. HONORABLE PEIRSON M. HALL, Judge of the District Court of the United States for the Southern District of California; THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA; MALLONEE, BUCKLIN, and FERGUS, acting as THE SHAREHOLDERS PROTECTIVE COMMITTEE OF LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; TITLE SERVICE COMPANY; ROBERT H. WALLIS; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WILMINGTON; HOME INVESTMENT CO.; GEORGE TURNER; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BELLFLOWER and JOHN D. WILLHOIT, *Respondents.*	No. 14378

WRIT OF MANDAMUS

UNITED STATES OF AMERICA, ss:

To the Honorable Peirson M. Hall, Judge of the United States District Court for the Southern District of California, and to

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ments described and set forth in said Exhibit A were, by order of the lower court entered on December 11, 1953 in Action 5421, directed to be delivered over to San Francisco Bank by the Clerk of said court on December 22, 1953. (As we have noted, supra, execution of this order was stayed by a later order of said court issued on December 21, 1953.) In the said delivery order of December 11, 1953, the lower court directed the Clerk to deliver to the said San Francisco Bank the bonds, cash and the various documents therein described. The amount of cash referred to in Exhibit A to the Writ of Mandamus and ordered to be delivered to San Francisco Bank is based upon the provisions of our Mandate of May 21, 1953, together with the terms of the aforesaid order of the lower court dated December 11, 1953, and the interest due on the said notes less the accruing interest on the said government bonds from day to day, all as evidenced in and computed, as nearly as may be, from

the United States District Court for the Southern District of California;

Greeting:

WHEREAS, On May 21, 1953, this Court issued to you its mandate in Appeals Nos. 12511 and 12591, being appeals from orders entered by you in consolidated Civil Actions Nos. 5421 and 5678 in your Court; and

WHEREAS, it appeared upon the petition of Federal Home Loan Bank of San Francisco, et al., for a writ of mandamus,

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these sources of information. In making his computations of interest as set forth in the said order of December 11, 1953 (which order was made in compliance with the aforesaid Mandate of this Court) the lower court appears to have attributed to coupons on the said bonds the aspect of cash. The interest therein mentioned was computed to August 3, 1953. As we indicated in said Exhibit A to the Writ of Mandamus herein ordered to be issued, it will be necessary to make additional computations of accrued interest to indicate the exact amount of cash to be delivered to San Francisco Bank under our Writ of Mandamus, as of the date of delivery of said cash. The Clerk of the lower court should readily make such computations from his records.

The said four promissory notes and nine agreements and documents had previously been impounded in the Registry of the Court pursuant to an order of the lower court entered in Action 5421 on March 13, 1948 all as appears in the printed record on appeal in cause 12511 in this Court. In response to said order the said San Francisco Bank delivered over to the Clerk of the lower court the said four notes and nine agreements and documents here referred to, said delivery being accompanied by a letter from said Bank dated March 20, 1948 in which was listed all of said notes and documents. On March 30, 1948, the said Clerk of the lower court acknowledged in writing over his signature the receipt of said four promissory notes and said nine documents, said acknowledgment being placed on a carbon copy of said letter of delivery which copy was returned to said San Francisco Bank after delivery to said Clerk was effected. A photostatic copy of said letter of delivery and acknowledgment of the Clerk is on file as an Exhibit in the instant proceeding.

The cash presently in the impound and affected by the Writ of Mandamus herein directed to be issued appears to have been retained in the impound at all times here pertinent. Details concerning the reason for and basis of retention of this cash by the Clerk of the lower court in the Registry of said court will be found in an order and judgment of the lower court entered in the so-called "consolidated actions" on March 26, 1948. Under an order or orders of the lower court the government bonds here involved have been held, and are now held for safe keeping by the Los Angeles Branch of the Federal Reserve Bank of San Francisco.

injunction, and other appropriate relief, filed in this proceeding, and upon the returns and answers of respondents herein and the exhibits and records filed herein that you had certified and returned to this Court an insufficient cause against the awarding and issuing of a writ of mandamus, and it was considered by this Court that you have failed to comply fully with said mandate and that the peremptory writ of the United States issue, requiring and commanding you, the said Judge of said District Court, and said District Court to take action necessary to comply fully with said mandate;

Now, THEREFORE, you are hereby commanded and enjoined immediately after the receipt of this writ, and without delay, to

(1) dismiss forthwith Civil Action No. 5421 and all pleadings and proceedings therein in said District Court; and (2) to dismiss such of the following pleadings in Civil Action 13979 in said District Court as have not heretofore been dismissed, to wit: Cross-claim filed by Long Beach Federal Savings and Loan Association, Third Party Complaint filed by Long Beach Federal Savings and Loan Association, Complaint in intervention and interpleader of Title Service Company, Complaint in intervention of Robert H. Wallis, Complaint in intervention of John D. Willhoit, Cross-claim of Home Investment Company, and all other cross-claims, third party complaints, interventions and interpleaders, motions and proceedings in said action No. 13979 which bring in question (a) the validity of the appointment of A. V. Ammann, as conservator of Long Beach Federal Savings and Loan Association; and (b) that said A. V. Ammann was validly authorized to act as the conservator of said Long Beach Federal Savings and Loan Association, during his tenure as conservator; (c) that said Mallonee, Bucklin and Fergus and said Long Beach Federal Savings and Loan Association are precluded, by their failure to resort to the administrative remedy tendered them by the Federal Home Loan Bank Administration in connection with the appointment and conduct of said Conservator, from obtaining any judicial relief based on the alleged invalidity of the appointment of said A. V. Ammann as Conservator of said Long Beach Federal Savings and Loan Association or on his alleged lack of authority to act as the Conservator of said Association during his tenure as Conservator; (d) the legality of the action of the

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Petitioners, vs. HONORABLE PEIRSON M. HALL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, et al., Respondents.	No. 14,378 ORDER

It is hereby ordered by this Court that its opinion in the above styled proceeding No. 14,378 in this Court as the same is reported in 225 F.2d at page 349, et seq. shall be amended by the addition thereto of certain language to wit:

To the first full paragraph set out in the second column on page 388 of said reported opinion the first sentence of which paragraph reads as follows: "The Clerk of said District Court is * * *" there shall be added a separate full sentence rdading as follows:

> Nothing herein shall be construed to prevent the District Court, if it so elects, from vacating the stay of its order of July 22, 1954 assessing costs of reference and directing its clerk to pay to Ronald Walker, Special Master, the amount therein specified from funds remaining on deposit in the Court after delivery of the property herein specified to the Federal Home Loan Bank of San Francisco.

United States Circuit Judges.

Federal Home Loan Bank Administration in liquidating, reorganizing and dissolving the Federal Home Loan Bank of Los Angeles, in transferring its assets and liabilities to the Federal Home Loan Bank of Portland, in changing the name of said Federal Home Loan Bank of Portland to Federal Home Loan Bank of San Francisco, and in moving it to San Francisco; or (e) the present legal existence of the Federal Home Loan Bank of San Francisco as the duly authorized Federal Home Loan Bank for the Eleventh Home Loan Bank district as readjusted by Federal Home Loan Bank Administration Order No. 5083, dated March 29, 1946.

The Clerk of said District Court is hereby commanded and enjoined to deliver to the Federal Home Loan Bank of San Francisco within five days of the date hereof and upon the giving by said Federal Home Loan Bank of San Francisco of a receipt in the form hereto attached, marked Exhibit A, all the property and documents and cash described in said receipt.

You are further commanded and enjoined to certify perfect obedience and due execution of this writ to this Court within ten days from the date hereof. Hereof fail not at your peril and have then and there this writ.

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MALLONEE, et al., *Plaintiffs,* vs. FAHEY, et al., *Defendants.*	No. 5421-PH Civil Receipt

The undersigned, Federal Home Loan Bank of San Francisco, hereby acknowledges receipt of the following documents:

Original Straight Note dated June 28, 1947, for $2,300,000 in favor of Federal Home Loan Bank of San Francisco,

as payee, signed by Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator.

Original Straight Note dated November 20, 1947, for $500,000 in favor of Federal Home Loan Bank of San Francisco, as payee, signed by Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator.

Original Straight Note dated November 22, 1947, for $2,000,000 in favor of Federal Home Loan Bank of San Francisco, as payee, signed by Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator.

Original Straight Note dated November 24, 1947, for $1,500,000 in favor of Federal Home Loan Bank of San Francisco, as payee, signed by Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator.

Collection Agreement dated October 23, 1934 executed by Long Beach Federal Savings and Loan Association and Federal Home Loan Bank of Los Angeles.

Subordination Agreement dated October 23, 1934, executed by Long Beach Federal Savings and Loan Association.

Pledge Agreement dated July 10, 1943 executed by Long Beach Federal Savings and Loan Association.

Application for Advances and Signature Card dated November 8, 1944, executed by Long Beach Federal Savings and Loan Association.

Application for Advances and Signature Card dated May 20, 1946 executed by Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator.

Pledge Agreement dated May 20, 1946, executed by Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator.

Collection Agreement dated May 28, 1946, executed by Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator, and Federal Home Loan Bank of San Francisco by A. C. Newell, Vice President and E. E. Pearson, Assistant Secretary.

Subordination Agreement dated May 28, 1946, executed by Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator.

Subordination Agreement dated January 6, 1948 executed by Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator.

The undersigned further acknowledges receipt of United States Government Bonds in the aggregate par value of $5,300,000.00, with interest coupons attached, described as follows:

Description	Denominations	Maturity	The following and subsequent Coupons Attached
2¼% Treasury Bonds 1959-62 (Dtd 11-15-45)	26 at 100,000 Nos. 1912/35; 2077/8 2 at 10,000 Nos. 84345; Star 380	12-15-62	6-15-48
2½% Treasury Bonds of 1967-72 (Dtd 11-15-45)	13 at 100,000 Nos. 50757; 52982/8; 53218/22 13 at 10,000 Nos. 60859/60; 62487; 208876/80; 88404; 177089/90; 18485/6	12-15-72	6-15-48
2½% Treasury Bonds of 1967-72 (Dtd 6-1-45)	12 at 100,000 Nos. 7564; 10391; 27972/3; 30175/6; 26634; 22235; 7559; 8462; 16015/6 5 at 10,000 Nos. 74797; 20476/9	6-15-72	6-15-48

The undersigned further acknowledges receipt of the sum of Nine Hundred Ninety-Four Thousand Eight Hundred Thirteen and 74/100 Dollars ($994,813.74), together with Fourteen Cents (14¢) per day from and after January 1, 1955 to date of receipt, to-wit, the total sum of _____ Dollars ($_____).

Dated: _____, 1955.

Federal Home Loan Bank of San Francisco,

By _____

A. C. Newell, Vice President.

And it is Further Ordered that a writ of injunction issue directed to Respondents Mallonee, Bucklin and Fergus, and any other shareholder-members of said Long Beach Federal Savings and Loan Association, said Long Beach Federal Savings and Loan Association, said Title Service Company, said Robert H. Wallis and said Home Investment Company, their officers, agents, servants, employees, and attorneys, and all persons acting in active concert or participation with them, in the words and figures following, to wit:

THE UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. MCALLISTER and WILLIAM K. DIVERS, as members of the HOME LOAN BANK BOARD; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,

Petitioners,

vs.

HONORABLE PEIRSON M. HALL, Judge of the District Court of the United States for the Southern District of California; THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA; MALLONEE, BUCKLIN, and FERGUS, acting as THE SHAREHOLDERS PROTECTIVE COMMITTEE OF LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; TITLE SERVICE COMPANY; ROBERT H. WALLIS; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WILMINGTON; HOME INVESTMENT CO.; GEORGE TURNER; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BELLFLOWER and JOHN D. WILLHOIT,

Respondents.

No. 14378

INJUNCTION

Upon consideration of the Petition for Writ of Mandate, Injunction, and other appropriate relief filed in this Court by Petitioners, the returns and answers of Respondents thereto, the exhibits, files and records of the above entitled proceeding and

related appeals hereinafter referred to and after hearing, this Court finds:

1. On April 2, 1952 this Court rendered its opinion and judgment in Appeal No. 12511, being an appeal by Petitioners herein from an order entered by Respondent District Court of the United States for the Southern District of California in consolidated civil actions Nos. 5421 and 5678 in said District Court, to which Petitioners and Respondents herein (other than Respondent District Court) were parties. As more fully appears from said opinion, reported as Home Loan Bank Board, et al. v. Mallonee, et al., 196 F.2d 336, cert. denied 345 U.S. 952, this Court held that the amended and supplemental complaints, cross-claims, and third party complaints of Mallonee, Bucklin and Fergus, as shareholder-members of the Long Beach Federal Savings and Loan Association of Long Beach, California, of said Long Beach Federal Savings and Loan Association, of Title Service Company, of Robert H. Wallis, and of Home Investment Co. failed to state any claim for relief within the jurisdiction of said District Court because the basic, underlying issue presented by said pleadings, i.e., the validity of the appointment of A. V. Ammann as Conservator of said Long Beach Federal Savings and Loan Association had been settled by the opinions and judgments of the Supreme Court of the United States, Fahey, et al. v. Mallonee, et al., 332 U.S. 245, and Ex parte Fahey, 332 U.S. 258; because said A. V. Ammann was validly authorized to act as the Conservator of said Long Beach Federal Savings and Loan Association; and because said Mallonee, Bucklin and Fergus and said Long Beach Federal Savings and Loan Association were precluded, by their failure to resort to the administrative remedy tendered them by the Federal Home Loan Bank Administration in connection with the appointment and conduct of said Conservator, from obtaining any judicial relief; and that therefore said District Court should have dismissed said actions.

2. On November 6, 1952 this Court rendered its opinion and judgment in Appeal No. 12591, being an appeal by Petitioners herein from an order entered by Respondent District Court in said consolidated actions Nos. 5421 and 5678. As more fully appears from said opinion, reported as Fahey, et al. v. O'Melveny & Myers, et al., 200 F.2d 420, this Court held that the amended complaints, cross-claims and third party complaints of Mallonee,

Bucklin and Fergus as shareholder-members of said Long Beach Federal Savings and Loan Association, of said Long Beach Federal Savings and Loan Association, of said Federal Home Loan Bank of Los Angeles, and of six member-stockholders of said bank failed to state any claim for relief within the jurisdiction of said District Court because, among other grounds, the basic issue presented by said pleadings, i.e., the legality of the action of the Federal Home Loan Bank Administration in liquidating, reorganizing, and dissolving the Federal Home Loan Bank of Los Angeles, transferring its assets and liabilities to the Federal Home Loan Bank of Portland, Oregon, changing the name of said Federal Home Loan Bank of Portland to Federal Home Loan Bank of San Francisco and moving it to San Francisco did not present any justiciable controversy.

3. On May 21, 1953, this Court issued to said District Court its mandate in said appeals Nos. 12,511 and 12,591 and therein remanded said consolidated causes to said District Court with the following directions:

"1. Dismiss Civil Action No. 5678-P.H. at the cost of plaintiffs.

2. Dismiss the following pleadings in Civil Action 5421-P.H.:

(a) The complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;

(b) The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party complainant and cross-claimant;

(c) The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto, at the cost of said cross-claimant;

(d) The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;

(e) The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant;

3. Dissolve, set aside and vacate the order of said District Court entered the 13th day of March, 1948, in so far as the same requires Federal Home Loan Bank of San Francisco to deposit in the Registry of said District Court promissory notes in the aggregate principal amount of $6,300,000.00, collateral securing the same and any other documents or property deposited by San Francisco Bank pursuant to said order; and return to Federal Home Loan Bank of San Francisco without charge or impairment said promissory notes, together with Government bonds in the face amount of $5,300,000.00 with all interest coupons attached thereto at the time of deposit and together with cash from the sum in the Registry of said Court sufficient to make the combined total sum of $6,342,098.35, with interest on $6,300,000.00 at 2% per annum from the 10th day of March, 1948 until the date of such release.

4. Set aside and vacate said order of preliminary injunction entered the 2nd day of December, 1949.

You, therefore, are hereby commanded that such proceedings be had in said consolidated causes, in conformity with the opinions and judgments of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding."

4. On November 23, 1953 this Court rendered its opinion and judgment in Appeals Nos. 12,575, 12,893, 13,055, 13,411 and 13,558, being appeals by Petitioners herein from orders entered by said Respondent District Court in said consolidated actions Nos. 5421 and 5678. As more fully appears from said opinion reported as Fahey, et al. v. Calverley, Receiver, 208 F.2d 197, cert. denied, 347 U.S. 955, this Court again held that said District Court was without jurisdiction of the subject matter of either of said consolidated actions Nos. 5421 and 5678; that said consolidated actions presented no justiciable controversy within the jurisdiction of said District Court; and that this Court's previous decisions in said consolidated causes required not only the dismissal of the principal pleadings and proceedings but also the dismissal of matters ancillary thereto.

5. On May 4, 1954 this Court issued its mandate to said District Court in said Appeals Nos. 12,575, 12,893, 13,055, 13,411 and

13,558, wherein said District Court was directed to take such proceedings in said consolidated causes, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

6. The provisions of Sections 501 and 503 of the Housing Act of 1954 (Act of August 2, 1954, 68 Stat. 590) amending Section 402(c)(4) of the National Housing Act and subsection (d) of Section 5 of the Home Owners' Loan Act of 1933 do not affect in any way the force and applicability of this Court's said opinions, judgments and mandates and do not vest said District Court with any jurisdiction over the subject matter of said consolidated actions Nos. 5421 and 5678, or actions Nos. 13,979, 15,588, 17,133, 17,152, 17,153, or 17,154 referred to in paragraph 7 below.

7. Notwithstanding said opinions, judgments and mandates of this Court, said Mallonee, Bucklin and Fergus, said Long Beach Federal Savings and Loan Association, said Title Service Company, said Robert H. Wallis, and said Home Investment Company, have repeatedly failed and refused to give due force and effect to this Court's said opinions, judgments and mandates and have subjected Petitioners herein to oppressive harassment and expense by filing in said District Court additional complaints, cross-claims and cross-complaints against Petitioners herein seeking to relitigate the same issues finally determined by this Court's said opinions and judgments in the following actions now pending in said District Court: Federal Home Loan Bank of San Francisco v. Long Beach Federal Savings and Loan Association, Civil Action No. 13,979; Long Beach Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corporation, et al., Civil Action No. 15,588; Long Beach Federal Savings and Loan Association v. The United States of America, et al., Civil Action No. 17,133; Long Beach Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corporation, et al., Civil Action No. 17,152; Long Beach Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corporation, et al., Civil Action No. 17,153; and Long Beach Federal Savings and Loan Association v. Home Loan Bank Board, et al., Civil Action No. 17,154.

8. The filing of said complaints, cross-claims and cross-complaints by said Mallonee, Bucklin and Fergus, said Long Beach Federal Savings and Loan Association, said Title Service Company, said Robert H. Wallis, and said Home Investment Company constitutes an abuse of the process of said District Court and a violation of the mandates of this Court referred to above. Under the circumstances the usual remedies available to Petitioners herein of pleading res judicata to said complaints, cross-claims and cross-complaints and of taking appeals to this Court from appealable orders entered, or which may hereafter be entered, in said causes by said District Court are inadequate, and the issuance of an injunction by this Court restraining the relitigation of issues finally determined by said opinions and judgments of this Court is an appropriate and necessary means of enforcing compliance with said opinions and judgments of this Court.

Now, Therefore, in accordance with the opinion of this Court entered in this proceeding on July 18, 1955, It Is Hereby Ordered that Respondents Mallonee, Bucklin and Fergus, and any other shareholder-members of said Long Beach Federal Savings and Loan Association, said Long Beach Federal Savings and Loan Association, said Title Service Company, said Robert H. Wallis and said Home Investment Company, their officers, agents, servants, employees, and attorneys, and all persons acting in active concert or participation with them be, and they hereby are perpetually enjoined and restrained from instituting, maintaining or prosecuting in said Civil Actions Nos. 13,979, 15,588, 17,133, 17,152, 17,153, and 17,154, or in any other suit or action now pending or which may be hereafter brought in said District Court of the United States for the Southern District of California, or in any other court, any action, pleading, or motion bringing in question:

(1) The validity of the appointment of A. V. Ammann as Conservator of said Long Beach Federal Savings and Loan Association; (2) That said A. V. Ammann was validly authorized to act as the Conservator of said Long Beach Federal Savings and Loan Association during his tenure as Conservator; (3) That said Mallonee, Bucklin and Fergus and said Long Beach Federal Savings and Loan Association are precluded, by their failure to resort to the administrative remedy tendered them by the Federal Home Loan Bank Administration in connection with the appointment

and conduct of said Conservator, from obtaining any judicial relief based on the alleged invalidity of the appointment of said A. V. Ammann as Conservator of said Long Beach Federal Savings and Loan Association or on his alleged lack of authority to act as the Conservator of said Association during his tenure as Conservator; (4) the legality of the action of the Federal Home Loan Bank Administration in liquidating, reorganizing and dissolving the Federal Home Loan Bank of Los Angeles, transferring its assets and liabilities to the Federal Home Loan Bank of Portland, in changing the name of said Federal Home Loan Bank of Portland to Federal Home Loan Bank of San Francisco, and in moving it to San Francisco; or (5) the present legal existence of the Federal Home Loan Bank of San Francisco as the duly authorized Federal Home Loan Bank for the Eleventh Home Loan Bank district as readjusted by Federal Home Loan Bank Administration Order No. 5083, dated March 29, 1946.

(Endorsed:) Opinion, etc. Filed Jul. 18, 1955.
Paul P. O'Brien, Clerk.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO. 7-20-55—160

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 611

MALLONEE, BUCKLIN AND FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, ET AL., PETITIONERS

v.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B) is reported at 225 F. 2d 349. Earlier stages of this litigation which have been before this Court include *Fahey* v. *Mallonee,* 332 U. S. 245; *Ex parte Fahey,* 332 U. S. 258; *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336 (C. A. 9), certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978; *Fahey* v. *O'Melveny & Myers,* 200 F. 2d 420 (C. A. 9), certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978; *Fahey* v.

Calverley, 208 F. 2d 197 (C. A. 9), certiorari denied, 347 U. S. 955.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1955 (Pet. App. B). A timely petition for rehearing, filed on August 15, 1955, was denied on October 12, 1955 (Tr., Vol. II, Docs. 17, 20). The petition for a writ of certiorari was filed on January 6, 1956. The jurisdiction of this Court is invoked under 28 U. S. 1254.

QUESTIONS PRESENTED

1. Whether the 1954 amendments to the Home Owners' Loan Act of 1933 (Housing Act of 1954, 68 Stat. 590, 634–636, 12 U. S. C. (1952 Ed., Supp. II) 1464 (d)), which make the Federal Home Loan Bank Board a suable entity and provide an administrative procedure for, and subsequent judicial review of, the appointment by the Bank Board of a conservator for a federal savings and loan association, vested the District Court with jurisdiction of a 1946 action challenging the appointment of a conservator, even though the action had previously and finally been held not within the court's jurisdiction because of petitioners' failure to exhaust their then administrative remedy.

2. Whether the Court of Appeals properly exercised its discretion in issuing writs of mandamus and injunction to enforce compliance with its earlier mandate, where the District Court re-

fused to comply with the mandate and petitioners filed several new actions to litigate issues already adjudicated and to harass respondents and nullify earlier decisions in the same litigation by this Court and the Court of Appeals.

STATEMENT

Brief description of the basic litigation.[1] The instant petition seeks to bring before this Court for a fourth time the exhaustive litigation devised by petitioners to nullify two actions taken in 1946 by the Federal Home Loan Bank Commissioner[2] in connection with his functions of supervising the Federal Home Loan Act System. The first step was the readjustment of the Federal Home Loan Bank districts of Portland and Los Angeles and their merger into a new San Francisco district. The second action, which forms the basis of the instant petition, was the appointment of a conservator for the Long Beach Federal Savings and Loan Association after an investigation had disclosed prima facie evidence of serious irregu-

[1] A more extensive survey of this complex litigation is set forth in our Brief in Opposition in No. 591, Oct. Term., 1952, pp. 5–28, and in the related memoranda and briefs in Nos. 592–596, 658, Oct. Term., 1952. See also our Briefs in Opposition in Nos. 656 and 659, Oct. Term., 1953.

[2] By virtue of Reorganization Plan No. 3 of 1947 (61 Stat. 954, 5 U. S. C. 133y (p. 147)), the Home Loan Bank Board succeeded to the functions of the Federal Home Loan Bank Commissioner. By Sec. 109 (a) of the Housing Amendments of 1955 (Act of August 11, 1955, 69 Stat. 635, 641) the name of the Home Loan Bank Board was changed to Federal Home Loan Bank Board.

larities on the part of its management.[3] An injunction obtained by petitioners from a statutory three-judge District Court prohibiting the holding of administrative hearings to determine the appropriateness of this action, and removing the conservator, was reversed by this Court in *Fahey* v. *Mallonee,* 332 U. S. 245, on the ground "that it was error * * * to oust the Conservator or to enjoin any of his proceedings or to enjoin the administrative hearing, and this without prejudice to any other administrative or judicial proceedings which may be warranted by law" (332 U. S. at 257–258).

After remand, the proceedings went through a series of extremely complicated procedural stages brought about largely by petitioners' failure to cast the issues simply in terms of what was really involved:— *i. e.,* an attempt to obtain judicial review of the regulation and supervision of the Long Beach Association, and their attempt to consider such administrative action as an utter nullity. The reason for this method of pleading apparently was petitioners' hope to escape the operation of the rule requiring the exhaustion of administrative remedies and preventing collateral attack upon administrative action. As a result, the length and number of pleadings, the number of parties drawn into the case, and the record reached astronomical proportions (*Home*

[3] Cf. our Brief in Opposition filed in No. 591, O. T. 1952, pp. 32–34.

Loan Bank Board v. *Mallonee,* 196 F. 2d 336, 369 (C. A. 9)); and the complexity of the proceedings grew enormously.[4]

Early in 1948, the Bank Board rescinded the appointment of the conservator of the Long Beach Association, and possession of the Association's assets was returned to its management. *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, 384–385 (C. A. 9). But petitioners continued to litigate in an effort to have the original appointment of the conservator and all his actions declared null and void, as well as to recover enormous alleged damages.

Finally, in 1952, five years after the decision of this Court in *Fahey* v. *Mallonee, supra,* the Court of Appeals for the Ninth Circuit reviewed an injunction granted by the District Court which in effect nullified the supervisory powers of the Federal Home Loan Bank Board over the Long Beach Association. The Court of Appeals reversed the injunction,[5] and in exercising its authority to determine whether there were insuperable objections to the entire suit[6] it held that the

[4] The record here on the first petitions for certiorari (Nos. 591–596, 658, O. T. 1952) comprised 28 printed volumes.

[5] *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, 383–390, 391.

[6] *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 52–53, and the authorities there cited; *North Carolina R. R.* v. *Story,* 268 U. S. 288, 292; *Deckert* v. *Independence Corp.,* 311 U. S. 282, 287.

entire proceedings were subject to dismissal in view of petitioners' failure to exhaust their administrative remedy. *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, 370–371, 378–383.

Also in 1952, the Court of Appeals, on an appeal from an order awarding attorneys' fees in the action challenging the merger of the Portland and Los Angeles Home Loan Banks into the San Francisco Bank, ruled that that action did not state a justiciable controversy within the jurisdiction of the District Court and reiterated that the related action challenging the appointment of the conservator for the Long Beach Association must be dismissed for failure to exhaust administrative remedies. *Fahey* v. *O'Melveny & Myers,* 200 F. 2d 420, 428.

Petitions for certiorari by petitioners here and allied litigants to review both decisions (Nos. 591–596, 658, Oct. Term, 1952), submitted and briefed by both sides in the realization that a denial would result in a mandate dismissing the action,[7] were denied by this Court. 345 U. S. 952, rehearing denied, 345 U. S. 978.

The Court of Appeals thereupon issued its mandate, dated May 21, 1953, remanding the proceedings to the District Court and directing it to proceed in conformity with the opinion of the Court of Appeals and specifically (1) to return to re-

[7] Cf. No. 591, O. T. 1952, Petition, p. 6, first question presented, see also pp. 55–56; our Brief in Opposition, No. 591, pp. 31–32, 46.

spondent Federal Home Loan Bank of San Francisco promissory notes in the face amount of $6,300,000 executed by petitioner Long Beach Association, acting through the conservator, together with some $7,000,000 in United States Government bonds and cash which the Bank had held as collateral security for the promissory notes but which the District Court had earlier required the Bank to deposit in its registry; and (2) to dismiss petitioners' principal pleadings (Pet. App. B, pp. 9–12; 225 F. 2d at 356–357).

In 1953, respondents here took three other appeals to the Court of Appeals from orders of the District Court which awarded fees to a Special Master out of funds on deposit in the registry of the District Court, appointed a limited receiver of respondent Federal Home Loan Bank of San Francisco, and awarded an allowance to the receiver for litigation expenses, also to be paid out of funds in the registry of the District Court. The Court of Appeals remanded these three appeals to the District Court with directions to vacate the orders appealed from, holding for the third time that the District Court was without jurisdiction of the subject matter of the basic suit of petitioners here. *Fahey* v. *Calverley*, 208 F. 2d 197, certiorari denied, 347 U. S. 955.

The instant proceedings. Notwithstanding the holdings of the Court of Appeals and this Court's denials of petitions for certiorari, the District Court refused to return to the Federal Home

Loan Bank of San Francisco the promissory notes and collateral security as specifically directed by the Court of Appeals' mandate of May 19, 1953, and continued to enter orders premised on the view that the basic litigation was to continue (Pet. App. B, pp. 18–20; 225 F. 2d at 361–363). See also App. I to Return, pages 142–146, 150–152, 174–188; *Federal Home Loan Bank of San Francisco* v. *Long Beach Federal Savings & Loan Association,* 122 F. Supp. 401, 467–469, 471–472; 122 F. Supp. 960, 993–999. Furthermore, petitioner Long Beach Association filed in the District Court five new actions seeking to relitigate all the issues which the Court of Appeals had thrice held to be beyond the jurisdiction of the District Court (Pet. App. B, pp. 25–28; 225 F. 2d at 365–367).

In addition, in an action which respondent Federal Home Loan Bank of San Francisco had filed in a California state court against petitioner Long Beach Association to collect the promissory notes, and which Long Beach Association had removed to the District Court, the Association filed an answer denying liability on the promissory notes on various grounds and a cross claim which again raised all the issues previously disposed of by the Court of Appeals (Pet., p. 6; Pet. App. B, pp. 21–23; 225 F. 2d at 363–364).

Faced with the refusal of the District Court to comply with the mandate of the Court of Appeals and the prospect of interminable relitigation of

the issues already disposed of by the Court of Appeals, respondents here petitioned the Court of Appeals for a writ of mandamus to the District Court to compel compliance with its mandate and also for an injunction against Long Beach Association and its allied litigants to restrain them from relitigating the issues already disposed of (Tr., Vol. I, Doc. 1).

On July 18, 1955, the Court of Appeals ruled that the District Court had failed to comply with the 1953 mandate and that the new actions filed in the District Court by the Long Beach Association sought to relitigate all the issues which had already been determined by the Court of Appeals and "are designed to and do frustrate and nullify" the decisions of that court (Pet. App. B, pp. 21–32, 57; 225 F. 2d 349, 363–370, 385). The Court of Appeals also ruled that petitioners here have subjected respondents here "to oppressive harassment and expense by filing in said District Court additional complaints, cross-claims and cross-complaints seeking to relitigate the same issues finally determined by this Court's said opinions and judgments"; that the filing by petitioners of these pleadings "constitutes an abuse of the process of said District Court"; and that "Under the circumstances the usual remedies * * * of pleading res judicata * * * and of taking appeals to this Court from appealable orders entered * * * in said causes by said District Court are inadequate, and the issuance of an

injunction by this Court * * * is an appropriate and necessary means of enforcing compliance with said opinions and judgments of this Court" (Pet. App. B, pp. 70, 71; 225 F. 2d at 393).

The Court of Appeals accordingly (1) ordered the issuance of a writ of mandamus to the District Court requiring it specifically to take the actions directed by the 1953 mandate—the dismissal of petitioners' basic action[8] and the return to respondent San Francisco Bank of the promissory notes and of the $7,000,000 collateral; and (2) ordered the issuance of an injunction restraining petitioners from maintaining any action bringing in question (a) the validity of the appointment of the conservator of petitioner Long Beach Association; (b) that petitioners are precluded by their failure to resort to the available administrative remedy from obtaining any judicial relief based on the alleged invalidity of the appointment of the conservator; or (c) the validity of the action of the Federal Home Loan Bank Administration in establishing respondent Federal Home Loan Bank of San Francisco (Pet. App. B, pp. 60–72; 225 F. 2d at 386–394). These writs leave the Long Beach Association free to defend the suit

[8] The Court of Appeals pointed out that its earlier opinions called for dismissal of the entire action (as petitioners then represented to this Court) and that the 1953 mandate was to be read in the light of those opinions (Pet. App. B, pp. 13–14 (footnote), 50–57; 225 F. 2d at 359 (footnote), 381–384).

of the San Francisco Bank on the notes, on any ground pleaded in its answer (*e. g.*, lack of consideration, statute of limitations) other than the issues already adjudicated by the Court of Appeals (see Pet., p. 6). The present petition seeks to review this action.

The Court of Appeals denied petitioners' petitions for rehearing and denied their application to stay the issuance of the writs of mandamus and injunction pending this application for certiorari (Tr., Vol. II, Doc. 20). On October 31, 1955, Mr. Justice Douglas also denied petitioners' application for a stay. The writs of mandamus and injunction thereupon issued and the District Court has complied with the writ of mandamus by returning the notes and collateral to respondent San Francisco Bank and dismissing petitioners' basic action (Tr., Vol. II, Doc. 22).[9]

ARGUMENT

Except for the contention that the 1954 amendments to the Home Owners' Loan Act of 1933 (Housing Act of 1954, 68 Stat. 590, 634–636, 12 U. S. C. (1952 Ed., Supp. II) 1464 (d)) nullify

[9] On January 5, 1956, petitioners filed in the Court of Appeals notices of appeal to this Court, purportedly pursuant to 28 U. S. C. 1254 (2), from the same judgment sought to be reviewed by the instant petition.

On December 30, 1955, petitioners filed in the District Court notices of appeal from the judgment of that court dismissing petitioners' basic action and returning the notes and collateral to the San Francisco Bank in compliance with the writs issued by the Court of Appeals.

all the prior decisions of this Court and of the Court of Appeals in this litigation and vest the District Court with jurisdiction over it, the present petition essentially seeks a rehearing of the issues previously presented in this Court (Nos. 591–596, 658, Oct. Term, 1952; Nos. 656, 659, Oct. Term, 1953). The ruling of the Court of Appeals directing the dismissal of petitioners' basic action was fully presented to this Court in Nos. 591–596, 658 (see the Statement, pages 5–6, *supra*). And the 1953 mandate of the Court of Appeals specifically directing the District Court to return the notes and collateral from its registry to the San Francisco Bank was set forth in the Brief in Opposition in No. 656, October Term, 1953 (Appendix, pp. 16–19) and in the Brief in Opposition in No. 659, October Term, 1953 (Appendix, pp. 12–15). The denial of those petitions for certiorari concluded those issues and they are not now open for review. We shall therefore discuss only the questions of (1) the effect of the 1954 amendments to the Home Owners' Loan Act, and (2) the propriety and reach of the Court of Appeals' writs of mandamus and injunction.

1. The Housing Act of 1954 (68 Stat. 590, 634–636, 12 U. S. C. (1952 Ed., Supp. II) 1464 (d)) amended the Home Owners' Loan Act of 1933 (the basic statute providing for the creation and supervision of federal savings and loan associations by the Federal Home Loan Bank Board) in certain respects. The full text of the relevant

1954 amendments is set forth in the Appendix, pages 18–20, *infra*. The holding of the Court of Appeals that these 1954 amendments did not nullify its earlier decisions in this litigation and vest the District Court with jurisdiction over petitioners' action (Pet. App. B, pp. 36–41; 225 F. 2d at 372–375) was plainly correct.

The 1954 amendments made the Home Loan Bank Board a suable entity for the first time.[10] But since the rulings of the Court of Appeals were based not upon the District Court's lack of jurisdiction over the Bank Board or its members, but rather upon the principle that petitioners' failure to exhaust their administrative remedy before the Bank Board barred them from relief in the courts, this 1954 amendment clearly did not vest the District Court with jurisdiction over the basic actions. See Pet. App. B, pp. 38–39; 225 F. 2d at 374.

With respect to the appointment of a conservator for a federal savings and loan association, the 1954 amendments, far from abrogating the traditional requirement that a litigant must exhaust his administrative remedies before seeking judicial relief, reinforce that rule. The amendments provide (12 U. S. C. (1952 Ed., Supp. II) 1464 (d) (2)) that the Board shall not appoint

[10] "The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico."

a conservator except upon notice to the association and an opportunity for an administrative hearing in accordance with the provisions of the Administrative Procedure Act and subject to judicial review as provided in the latter act. Cf. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499–500. Accordingly, this amendment does not eliminate the basic defect in petitioners' action.[11]

Since the 1954 amendments do not eliminate the consequences of petitioners' failure to exhaust their administrative remedy, it is unnecessary to consider whether the amendments were intended in any event to apply retroactively to a conservator appointed in 1946, so as to nullify the prior decisions of this Court and of the Court of Appeals. But the conclusion of the Court of Appeals that the amendments have no such effect

[11] A separate subsection of the 1954 amendments (12 U. S. C. (1952 Ed., Supp. II) 1464 (d) (1)) provides a means for enforcing the laws and regulations applicable to federal savings and loan associations without appointing a conservator. It provides that, upon the Bank Board's giving an association notice of an alleged violation of law or regulation, either the Board or association may apply to a District Court for a declaratory judgment and an injunction with respect to such controversy. Since that subsection is expressly made inapplicable to the appointment of a conservator of a savings and loan association, it could not have application to this controversy. And even that subsection provides for the Board's giving notice of charges and the holding of a hearing in accordance with the Administrative Procedure Act and subject to judicial review as provided by that Act. See S. Rep. No. 1472, 83d Cong., 2d sess., p. 43.

(Pet. App. B, pp. 36–41; 225 F. 2d at 372–375) seems plainly correct. The elimination in conference of a Senate amendment declaring the 1954 amendments inapplicable to pending actions, without explanation (S. Rep. No. 1472, p. 144, H. Rep. No. 2271, pp. 48–50, 84, 83d Cong., 2d sess.), "is without meaning for purposes of statutory interpretation." *Order of Railway Conductors* v. *Swan,* 329 U. S. 520, 529; cf. *United States* v. *United Mine Workers,* 330 U. S. 258, 277; *Gemsco, Inc.* v. *Walling,* 324 U. S. 244, 263.

2. The petition does not challenge the authority of the Court of Appeals to enforce compliance with its 1953 mandate by the writs of mandamus and injunction.[12] In the light of the District Court's persistent failure to comply with the mandate and petitioners' harassing tactics in filing several new actions seeking to relitigate all the issues decided by the Court of Appeals, the discretion exercised by the Court of Appeals to issue the writs was well warranted. In the light of the careful and painstaking reviews given this litigation by the Court of Appeals, its deliberate judgment that direct mandatory action was now necessary, after a two year delay, cannot be assailed.

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[12] That authority is clear. 28 U. S. C. 1651; *United States Alkali Export Association* v. *United States,* 325 U. S. 196, 201–4; *De Beers Consolidated Mines* v. *United States,* 325 U. S. 212, 217; *In re Sanford Fork & Tool Co.,* 160 U. S. 247, 255; *Toledo Scale Company* v. *Computing Scale Company,* 261 U. S. 399, 426.

Petitioners' contention that the Court of Appeals has improperly decided, by its writs, the "merits" of the action by the San Francisco Bank on the notes lacks all foundation. That court, by its earlier decisions, ruled that the action challenging the appointment of the conservator and his status could not be maintained because petitioners failed to exhaust their administrative remedy and that the action challenging the establishment of the Federal Home Loan Bank of San Francisco failed to present a justiciable controversy. The writs of mandamus and injunction are carefully limited to those issues, which petitioners seek to continue to relitigate in every form and on every occasion they can (Pet. App. B, pp. 62–63, 67–69, 71–72; 225 F. 2d at 388, 391–393, 394). Those issues, whether termed jurisdictional or not, are *res judicata* by virtue of the earlier decisions of the Court of Appeals. *Stoll* v. *Gottlieb,* 305 U. S. 165, 177; *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 376–7; *Angel* v. *Bullington,* 330 U. S. 183, 190. But petitioner Long Beach Association remains free to defend the suit of the San Francisco Bank on the notes, on the other grounds pleaded in its answer (see Pet., p. 6).[13]

[13] Since the collateral for the notes consists of cash and United States Government bonds, which have daily published market prices, petitioners' purported fears of "secret foreclosure" plainly lack merit.

CONCLUSION

The decision of the court below was correct and in full harmony with its earlier decisions which this Court has refused to review. It is respectfully submitted that this petition for a writ of certiorari should likewise be denied.

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FEBRUARY 1956.

APPENDIX

PERTINENT PROVISIONS OF THE 1954 AMENDMENTS TO THE HOME OWNERS LOAN ACT OF 1933 (HOUSING ACT OF 1954, 68 STAT. 590, 634–636, 12 U. S. C. (1952 ED., SUPP. II) 1464 (d))

SEC. 503. The Home Owners' Loan Act of 1933, as amended, is hereby amended—

* * * * *

(2) by amending subsection (d) of section 5 to read as follows:

"(d) (1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in subsection (d) (2) hereof, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in subsection (d) (2) hereof. Such association shall have thirty days within which to correct

the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is

located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Home Loan Bank Board, Washington, District of Columbia.

"(2) The grounds for the appointment of a conservator or receiver for a Federal savings and loan association shall be one or more of the following: (i) insolvency in that the assets of such association are less than its obligations to its creditors and others, including its members; (ii) violation of law or of a regulation; (iii) the concealment of its books, records, or assets or the refusal to sumbit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Home Loan Bank Board; and (iv) unsafe or unsound operation. The Board shall have exclusive jurisdiction to appoint a Supervisory Representative in Charge, conservator, or receiver. If, in the opinion of the Board, a ground for the appoint-

ment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint ex parte and without notice a Supervisory Representative in Charge to take charge of said association and its affairs who shall have and exercise all the powers herein provided for conservators and receivers. Unless sooner removed by the Board, such Supervisory Representative in Charge shall hold office until a conservator or receiver, appointed by the Board after notice as herein provided, takes charge of the association and its affairs, or for six months, or until thirty days after the termination of the administrative hearing and final proceedings herein provided, or until sixty days after the final termination of any litigation affecting such temporary appointment, whichever is longest. The Board shall have the power to appoint a conservator or receiver but no such appointment of a conservator or receiver shall be made except pursuant to a formal resolution of the Board stating the grounds therefor and except notice thereof is given to said association stating the grounds therefor and until an opportunity for an administrative hearing thereon is afforded to said association. Such hearing shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to review as therein provided and the review by the court shall be upon the weight of the evidence. A conservator shall have all the powers of the members, the directors, and officers of the Federal association and shall be authorized to operate it in its own name or conserve its assets in the manner and to

the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for any Federal savings and loan association, which shall have power as receiver to buy at its own sale subject to approval by the Board. With the consent of the association expressed by a resolution of the board of directors or of its members, the Board is authorized to appoint a conservator or receiver for a Federal association without notice and without hearing. The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations and for such associations in conservatorship and receivership and for the conduct of conservatorships and receiverships. Whenever a Supervisory Representative in Charge, conservator, or receiver, appointed by the Board pursuant to the provisions of this section, demands possession of the property, business and assets of any association, the refusal of any officer, agent, employee, or director of such association to comply with the demand shall be punishable by a fine of not more than $1,000 or by imprisonment for not more than one year or both by such fine and imprisonment."

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IN THE

Supreme Court of the United States

October Term, 1955

No. 611

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; HOME INVESTMENT COMPANY, as representatives of a class of homeowners; TITLE SERVICE COMPANY, as trustee on homeowners' trust deeds; ROBERT H. WALLIS; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BELLFLOWER; and JOHN D. WILLHOIT,

Petitioners,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER and WILLIAM K. DIVERS, as members of the Home Loan Bank Board; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,

Respondents

PETITIONERS REPLY TO OPPOSITION TO CERTIORARI

I. Respondents' Opposition to Certiorari Rests Wholly on Laws Now Repealed, and Conditions No Longer Existing.

Respondent's entire opposition relies on (1) petitioners' alleged failure in 1946-48 to exhaust administrative remedies, now wholly exhausted, refused, and denied; and (2) 1952-53 decisions of the Court of Appeals and 1953-54 denials of certiorari by this Court based thereon.[1]

[1] Denial of certiorari never imports decision of the merits by this Court. *Sunal* v. *Large*, 332 U.S. 174, 181; *House* v. *Mayo*, 324 U.S. 42, 48; *Brown* v. *Allen*, 344 U.S. 443, 497.

Such rule has particular application to this case. Herein the 1952-53 Court of Appeals decisions were based entirely on absence of jurisdiction, and resulted in dismissals for lack of jurisdiction. (See pgs. 27-29 of our petition). The 1953-54 denials of certiorari thereof could, at most, only confirm such absence of jurisdiction.

But such administrative remedies are *now* wholly exhausted. (See page 4 hereof). And Congress has given this very litigation, and the 1952-53 Court of Appeals' decisions, its full consideration. After such consideration, Congress has, by the Housing Act of 1954, (68 Stat. 590) repealed and amended the laws on which such 1952-53 decisions rested and expressly refused to exempt this very litigation from such amendments.[2]

Yet the Court of Appeals, in 1955, *after,* and despite the 1954 repeal, enforces by mandamus and injunction, the very laws Congress repealed.

Without any trial in any court, state or federal, the Court of Appeals has decided the *merits* of entirely new actions never before it (or this Court), on any prior appeals.[3] *New* actions filed in 1954 rely upon *new* jurisdiction expressly conferred by Congress on the U. S. District Court.

By the Housing Act of 1954, (68 Stat. 590) Congress made at least 4 *separate* grants of jurisdiction to the U. S. District Courts. Such grants of jurisdiction are to:

(1) " . . . the United States district court for the district where the association is located . . . "

(2) " . . . the United States district court of the district where the association affected has its home office . . . "

(3) " . . . the United States district court for the district where the home office of such association is located, . . . "

(4) " . . . the United States district court of the district where such hearing is designated [a hearing which] . . . shall be in the Federal judicial district of the association . . . "

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[2] See pgs. 15-17, and 22-28 of our petition.

[3] Respondents' $7,000,000 foreclosure action (13979) was filed in 1952, 6 years after petitioners' 1946 action (5421). These actions were never consolidated. Foreclosure and petitioners' defenses thereto are entirely separate and apart from the 1952-53 decisions of the Court of Appeals. No appeals taken in 13979 have yet been heard in the Court of Appeals, *nor have they ever been before this Court.*

This Act, passed *after, and because of,* the 1952-53 Court of Appeals decisions, was not, and could not be, decided by the Court of Appeals *before it was passed by Congress.*

Yet the Court of Appeals, in 1955, relying wholly on its own 1952-53 decisions, repeals and nullifies this 1954 Act of Congress, which 4 times expressly confers jurisdiction on the U. S. District Court. Such repeal was accomplished as part of an original "perpetual injunction" by the Court of Appeals against petitioners, by finding (Appx. B, pg. 70, No. 6):

> "The provisions of Sections 501 and 503 of the Housing Act of 1954 . . . amending . . . subsection (d) of Section 5 of the Home Owners' Loan Act of 1933 . . . do not vest said District Court with any jurisdiction over the subject matter of said . . . actions Nos. . . . 17,133, 17,152, 17,153, or 17,154 . . . "

> (Pg. 71) "The filing of said complaints, . . . constitutes an abuse of the process of said District Court . . ."

Each of such actions are new, filed in 1954. Each explicitly allege exhaustion, denial, and non-existence of administrative remedies.

Such *new* allegations have never been heard or tried. *Nor have they ever been previously considered by this Court,* or the Court of Appeals. Yet petitioners have been ". . . perpetually enjoined" by the Court of Appeals ". . . from . . . prosecuting in said . . . Actions . . . or in any other suit or action now pending or which may be hereafter brought in said District Court . . . or in any other court . . . "—*new* matters never heard or decided by any court, trial or appellate, i.e., repeated refusal and denial of *any* administrative hearing by respondent Bank Board.

II. Administrative Remedies Are Now Exhausted, Denied and Non-Existent.

All of the pleadings ordered dismissed in 1955 were filed long after the 1948 removal of respondent conservator.[4] All contain allegations that administrative remedies are *now* exhausted, non-existent and unavailable. Examples of such allegations are:

(a) "That plaintiff [petitioner Association] has wholly and completely exhausted all administrative hearings, remedy and process, available to it. . . "

"That said Home Loan Bank Board has denied and refused the making of any administrative orders whatsoever, has denied that it has power to make such orders, and plaintiff has wholly exhausted all administrative remedies . . ."[5]

(b)" . . . No administrative remedies, hearing, process or procedure exists or is available to plaintiff."[6]

(c) " . . . administrative hearings so demanded and requested . . . were denied and refused by defendant Home Loan Bank Board, et al., and no such administrative hearings were then or have ever since been held."[7]

Similar allegations are contained in each of the 1955 dismissed cross-claims, complaints, actions and pleadings.

Respondent Bank Board itself has twice, in 1953 and 1955, denied and refused any administrative relief to petitioners. In 1955, respondent Bank Board refused to even hold *any* administrative hearing ". . . for the reason that the Federal Home Loan Bank Board is without authority to grant the relief sought . . ."[8]

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[4] After removal of the conservator in January of 1948, pleadings in action 5421 were completely recast by amendments and supplements. Petitioners' defensive cross-claims in foreclosure action (13979) were not filed until 1952.

[5] Complaint in action 17154, Par. XI, pg. 12, lines 9 to 10, and pg. 13, lines 8 to 11.

[6] Complaint in action 17133, Par. XXXV, pg. 28, lines 24 to 25.

[7] Complaint in action 17152, Par. XVI, pg. 22, lines 6 to 9.

[8] See page 33 of our petition, Sec. G., "Administrative Remedies Have Been Exhausted".

None of these matters were, or could have been, previously considered by this Court. They did not exist at the time of prior (1953-54) denials of certiorari.

In quieting the titles of 8,000 homeowners against respondents' $7,000,000 threatened foreclosure, the U. S. District Court found (Appx. II, pg. 235):

> "None of the relief sought herein by said class representatives, [petitioners Association, homeowners, etc.] or any of them, was or could have been, granted or obtained by any administrative agency or bureau, process, or remedy."

This 1954 finding remains unreversed by the Court of Appeals. *It has never previously been before this Court.*

Appeals taken by respondents from said quiet title judgments remain docketed in the Court of Appeals, but unbriefed and unheard. Yet said unreversed 1954 quiet title judgments are nullified by original mandamus and injunction, compelling dismissal in 1955 without trial of all pleadings upon which they are based.

III. Petitioners Are Denied Any Hearing, Either Administrative or Judicial, and Are Thereby Denied Due, or Any, Process of Law.

Failure to obtain administrative hearing on *removal* of the conservator, cannot forfeit all rights to be heard on *all other matters.*

Petitioners' basic Constitutional rights to, in 1955, defend against secret foreclosure of, and to seek return of, and accounting for, their seized uncounted cash, bearer government bonds and negotiable securities, are not abolished merely because respondent Bank Board saw fit, in 1948, to remove respondent conservator *without* any administrative hearing.

Yet, solely because respondent conservator was so removed without administrative hearing, petitioners have been denied all further hearings, administrative or judicial.

Respondent Bank Board has repeatedly refused and denied administrative hearings sought on all other matters. And the Court of Appeals, by its 1955 original writs of mandamus and injunction, has precluded and "perpetually enjoined" any judicial hearings on the very matters, administrative hearings of which, were denied by respondent Bank Board.

By denial of all hearings, petitioners have been denied due, or any, process of law, and have been held incommunicado from justice.[9]

IV. Respondents Admit They Will Secretly Foreclose, Before Trial and Without Redemption, $7,000,000 of Savings Deposits of 30,000 Federal Savings Depositors.

By their "Brief For The Respondents In Opposition", respondents have again admitted and confirmed their intent and threats to secretly foreclose petitioners' savings deposits. Respondents say (pg. 16, footnote 13):

> "13. Since the collateral for the notes consists of cash and United States Government bonds, which have daily published market prices, petitioners' purported fears of 'secret foreclosure' plainly lack merit."

But, the "daily published market prices" of petitioners' $5,300,000 of U. S. Government bearer bonds become important only *if* petitioners' bonds are secretly sold *before trial*, and without redemption.[10]

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[9] Such violates every concept of due process established by this Court. *Joint Anti Fascist* v. *McGrath*, 341 U.S. 123, 143, 178; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413; *Hovey* v. *Elliott*, 167 U.S. 407.

[10] Respondents fail to tell this Court (1) that the "daily published market prices" of petitioners' U. S. Government bearer bonds are presently about 95, (2) that the cost of all said bonds to petitioner association was 100 or over (more than $2,500,000 cost, about 102), (3) that sale at 95 of petitioners' $5,300,000 of U. S. bonds would alone inflict a wholly unnecessary loss of nearly $350,000, (4) that petitioners have tendered, by *cashier's* check for $7,000,000, the *full* par price of 100. *Said tender was rejected by respondents.* See pg. 4 of our petition.

Respondents admit that despite the 1953 mandate of the Court of Appeals, their own separate foreclosure action (13979) must be tried. They say (pg. 16) ". . . Long Beach Assoication remains free to defend the suit of the San Francisco Bank on the notes, . . . "

But respondents refuse to give any assurances that they will not secretly foreclose before trial, and without redemption.[11]

After such secret foreclosure, petitioners would "remain free to defend the suit of the San Francisco Bank . . ." only at respondents' sufferance. Petitioners' defensive crossclaims have been dismissed without hearing. Respondents, after they had secretly foreclosed, *before trial*, could, at their pleasure, dismiss their yet untried court foreclosure action as moot. Thereby respondents would escape and nullify all safeguards set by U. S. Statutes regulating *court* foreclosures.[12]

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[11] At oral hearing of a stay application before Mr. Justice Douglas, respondents, in 1955, for the first time gave assurances that secret foreclosure of petitioners' savings would be temporarily postponed. However such postponement is *only* pending Supreme Court review. Respondents have repeatedly refused to give any assurances to the trial Court that they would postpone secret foreclosure of petitioners' savings until court trial of respondents' own foreclosure action 13979.

[12] Under Title 28 U.S.C.. § 2001-4, if, *after trial*, any sale ever be adjudged, the District Court, and not respondents, will decide (1) how much, *if any*, is due on respondents' denied $7,000,000 debt, (2) what, *if any*, lien exists to be foreclosed, (3) what part, *if any*, of petitioners' $5,300,000 of U. S. Government bearer bonds are to be sold. After these *Court* determinations, the Court, and not respondents, will set the price, terms, time and place of public, not secret, sale.

Title 28 U.S.C. § 2004: "*§ 2004. Sale of personalty generally.* Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise."

"*§ 2001. Sale of realty generally.* (a) Any . . . interest . . . sold under any order or decree of any court of the United States shall be sold . . . at public sale at the courthouse . . . Such sale shall be upon such terms and conditions as the court directs . . . No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published . . . at least ten days before confirmation. The private sale

V. "No" Vote of Both House and Senate Is Turned Into a "Yes" Vote by the Court of Appeals.

The original mandamus and injunction opinion of the Court of Appeals aptly refers to the application of the Housing Act of 1954 to this litigation, as the "basic issue" (Appx. B, pg. 36).

The opinion holds such Housing Act is "purely prospective" (Appx. B, pg. 40), and can have no effect on pending litigation or existing causes of action.

The opinion consists of *72* pages and cites *44* authorities,[13] *all* on other points. *But on the "basic issue" not one precedent is cited.* The decision rests on the flat fiat of the Court which adopts an argument of counsel also wholly lacking in any citation of precedent on the point.

The opinion does not even mention or discuss the legislative history of the Housing Act, during which the construction placed on the Act by the Court of Appeals was proposed to, and *expressly rejected by, both House and Senate.*[14]

The opinion also wholly fails to consider, or even mention the power expressly reserved by Congress to make statutory amendments immediately apply.[15]

Nor does the opinion either discuss or distinguish the unbroken line of 11 Supreme and Appellate Court decisions directly contrary to this holding of the Court of Appeals.[16]

Yet, by the mandamus and injunction of the Court of Appeals, the votes of both House and Senate, refusing to exempt this very litigation from the jurisdiction conferred

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shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale."

[13] 5 statutes and 39 decisions.

[14] See pg. 15 and 22 of our petition.

[15] See pages 15, 17, 19 of our petition for text of such reservations in conservator's notes sought to be foreclosed, and charters of foreclosing Federal Home Loan Bank and defending Federal Savings Association.

[16] See pgs. 19-22 of our petition.

by such Housing Act, are turned into a vote so exempting.[17]

A "no" vote of both Houses, by "interpretation" of the Court of Appeals, has become a "yes" vote enforcing forever by "perpetual injunction" the very law both Houses of Congress expressly refused to pass.

Conclusion

Although Congress acted to save them, petitioners' 30,000 savings depositors are enjoined, and are yet immediately threatened with secret foreclosure, before trial and without redemption, of their $7,000,000 of savings deposits.

Unless certiorari[18] be granted, no court can ever consider the refusal of Congress, in 1954, to pass the very law enforced in 1955 (and forever) by "perpetual injunction" of the Court of Appeals.

The District Court, upon which Congress expressly conferred jurisdiction, was not permitted to consider it. The Court of Appeals refused to consider it. Only this Court remains open.

Respectfully submitted,

CHARLES K. CHAPMAN,

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Attorney for petitioners, Mallonee, Bucklin, and Fergus, acting as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association,

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JOHN D. MILLER and
CHARLES K. CHAPMAN,

Attorneys for petitioner, Title Service Company, as trustee on homeowners' trust deeds,

RAYMOND TREMAINE,

Attorney for petitioner, Robert H. Wallis,

EMMETT E. DOHERTY,

Attorney for petitioner, John D. Willhoit.

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[17] See pgs. 15-17 and 22-28 of our petition.

[18] 3 of the 7 separate groups of petitioners for certiorari have also pending their direct appeals to this Court under Title 28 U.S.C. § 1254(2). But this remedy was unavailable to 4 of petitioners, including the protective committee for the class of petitioners' 30,000 savings depositors.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 611

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; HOME INVESTMENT COMPANY, as representatives of a class of homeowners; TITLE SERVICE COMPANY, as trustee on homeowners' trust deeds; ROBERT H. WALLIS; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BELLFLOWER; and JOHN D. WILLHOIT,

Petitioners,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER and WILLIAM K. DIVERS, as members of the Home Loan Bank Board; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,

Respondents.

PETITION FOR REHEARING OF DENIAL OF CERTIORARI PETITIONS.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners respectfully request a rehearing of their petitions for certiorari, filed January 6, 1956, and denied February 27, 1956.

Statement.

Since denial of certiorari, 3 direct appeals to this Court, under 28 U. S. C. §1254(2), have been docketed on March 2, 1956, as October Term, 1955, No. 731, and are now pending.

Such direct appeals were (under said §1254(2)) available to only 3 of the 7 groups of petitioners for certiorari.[1]

The direct appeals present other substantial grounds available to said 3 petitioners, *but not included in said denied certiorari petitions,* and never previously presented to this Court.

Such grounds are invalidation by the Court of Appeals in 1955 of California State foreclosure and quiet title statutes as repugnant to laws of the United States, which were repealed by Congress in 1954.[2]

Question Presented.

Should this Court, upon consideration of direct appeals under 28 U. S. C. §1254(2), also consider certiorari petitions of other parties to the same litigation, whose rights will be decided by such appeals, but who are not, and cannot be, appellants therein?

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[1]Petitioners Long Beach Federal Savings and Loan Association, Title Service Company, and Home Investment Company, as representatives of the class of 8,000 homeowners.

[2]See Jurisdictional Statement, October Term, 1955, No. 731, pp. 10-13.

Argument.

Three direct appeals, taken after denial of certiorari herein, present substantial *new* grounds never previously presented to this Court, as part of the denied certiorari petitions. Decision thereof by this Court will necessarily affect the rights of 4 groups of petitioners[3] who are not, and cannot be, parties to such direct appeals, but who will yet be bound by the outcome thereof.

Denial of certiorari does not preclude consideration of the subsequent direct appeals by the 3 petitioners who are also appellants. (*Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 172; *Watson v. Employers Liability Assur. Corp.*, 348 U. S. 66, 70.)

But the 4 groups of petitioners who cannot take direct appeals under 28 U. S. C. §1254(2) will not be parties, nor will they participate therein. Yet they are bound thereby.

Under similar circumstances this Court has vacated its previous denials of certiorari and considered the merits as part of its subsequent decisions. (*Bradley Mining Co. v. Boice*, 345 U. S. 932; *Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 34, fn. 1; *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50; *White v. Texas*, 309 U. S. 631.)

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[3]Mallonee, Bucklin and Fergus, Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association; Robert H. Wallis; First Federal Savings and Loan Association of Bellflower; and John D. Willhoit.

Conclusion.

This Court is respectfully asked to consider this petition for rehearing of denial of certiorari at the same time that it considers its jurisdiction, or the merits, of the 3 now pending direct appeals (October Term, 1955, No. 731) in this same litigation.

Respectfully submitted,

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Attorney for petitioners, Long Beach Federal Savings and Loan Association and First Federal Savings and Loan Association of Bellflower,

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Attorney for petitioners, Mallonee, Bucklin, and Fergus, acting as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association,

F. HENRY NECASEK,

Attorney for petitioner, Home Investment Company, as representatives of a class of homeowners,

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CHARLES K. CHAPMAN,

Attorneys for petitioner, Title Service Company, as trustee on homeowners' trust deeds,

RAYMOND TREMAINE,

Attorney for petitioner, Robert H. Wallis,

EMMETT E. DOHERTY,

Attorney for petitioner, John D. Willhoit.

Certificate of Counsel.

Each of the undersigned hereby respectively certify that the foregoing joint petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the Rules of the United States Supreme Court.

CHARLES K. CHAPMAN,

WYCKOFF WESTOVER,

F. HENRY NECASEK,

RAYMOND TREMAINE,

EMMETT E. DOHERTY.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 611

MALLONEE, BUCKLIN AND FERGUS, ETC., ET AL.,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL.

BRIEF AMICUS CURIAE ON BEHALF OF DISTRICT COURT JUDGE PEIRSON M. HALL

I. Introduction

In this case the Court of Appeals for the Ninth Circuit has issued an extraordinary writ of mandamus against a United States District Judge, Peirson M. Hall. This decision is based upon a finding that Judge Hall did not carry out two disputed provisions of a Mandate of the Appellate Court in the exact manner intended by that Court.

One of the two disputed provisions of the Mandate ordered dismissal of five specific pleadings (out of many pleadings filed) in a specified action. The Court of Appeals now says it intended dismissal of the entire action. The record of the Court of Appeals when it issued the Mandate

contained many other pleadings in the action, but the Mandate was silent as to all except the five specified.

The other action of the District Court with which the Court of Appeals now disagrees is an order retaining Court custody of certain notes and collateral. The Court of Appeals' Mandate ordered their return to Respondents. The District Court's retention order was made because of changed conditions to protect the parties in a new judicial foreclosure action, brought by Respondents, involving the same notes and collateral.

The Court of Appeals ordered Judge Hall to decide the merits of Respondents' *Foreclosure Action.* That action is separate and apart from, and not referred to in, the Mandate. As stated, Respondents in that Action seek foreclosure upon the very notes and collateral which the Mandate ordered returned to Respondents. The notes in question permit *secret* foreclosure by Respondents. If Respondents secured possession of the notes and secretly foreclosed, the Respondents' foreclosure action would be rendered moot. Faced with conflicting orders from the Court of Appeals, and having been ordered by the Court of Appeals to try the *Foreclosure Action,* Judge Hall had to guard against secret foreclosure by Respondents. Respondents refused to agree that they would not secretly foreclose if given possession of the notes and collateral. In the light of Respondents' refusal, Judge Hall then did the only thing he could equitably do. He ordered the notes and collateral returned to Respondents by transferring them to Respondents' own *Foreclosure Action* to await its outcome. This constitutes compliance with both orders of the Court of Appeals in the two separate cases then pending before Judge Hall.

The retention order protects 8,000 home owners and 30,000 depositors against secret foreclosure by Respondents. It was made only after Petitioners herein did "equity" by offering a cashier's check for $7,000,000—the full amount

of Respondents' claim—to indemnify Respondents against any possible losses in their pending suit.

Throughout this litigation, and throughout his judicial career, the District Judge against whom these extraordinary writs were issued has stressed that he is bound by the law and by the Mandates of this Court and the Court of Appeals. Because of great differences of opinion among the parties over the proper construction of the Mandate herein the District Court Judge repeatedly requested the parties to apply to the Court of Appeals for an interpretation thereof. The parties failed to respond to that request, thereby placing the burden upon the Judge of interpreting what the Court of Appeals intended. The District Judge then, after extensive hearings, briefs and argument of Counsel for the parties, ruled on the disputed points and explained the reasons for his rulings and interpretations in three carefully prepared opinions.[1]

The Court of Appeals now disagrees in two instances with the orders of the District Court Judge. That Court herein has not only disagreed with and reversed those orders, it has used its extraordinary writ power to grant sweeping and drastic relief to Respondents of far reaching and unprecedented consequences.

Because his actions have been called in question by making him a personal litigant, and because he has spent more time on this litigation than any other Judge during the past ten years, Judge Hall feels called upon to present to this Court a short outline of the history of this litigation and a short outline of his work since the disputed Mandate was issued. He does not quarrel with the power of the

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[1] *Mallonee* v. *Fahey*, 117 F. Supp. 259; *Federal Home Loan Bank Board* v. *Long Beach Fed. S. & L. Assn.*, 122 F. Supp. 401; *Mallonee* v. *Fahey*, 122 F. Supp. 472.

These opinions cover over 200 pages and recite in detail most of the facts summarized in this Statement.

Court of Appeals to issue extraordinary writs in proper cases. He does feel called upon to have this Brief filed in order to set forth an independent review of the basic facts of this complicated litigation since neither Petitioners or Respondents have done so. He believes this review will aid the Court in its consideration of the Petition for Certiorari herein. He has requested Counsel of his own choosing to review the record herein and to prepare and present this Brief to the Court.

Counsel, who were requested by Judge Hall to prepare and file this brief, have not previously been connected with this litigation in any way.

II. Statement

While this brief *amicus curiae* is being filed with the full authority of, and at the request of, Judge Hall, the statements contained herein are the analysis and statements of Counsel and not those of Judge Hall personally.

This is a case of first impression and far-reaching consequences to the administration of justice. No precedent for the unique action of the Court of Appeals herein exists. If this decision stands, the extraordinary writs of mandamus and injunction will have become substitutes for the appellate processes prescribed by statute for the orderly administration of justice. In this case no facts exist justifying such substitution. And worst of all, a conscientious hard working District Judge will have been mandamused, and in effect criticized, for doing what appears to these Counsel to be the very type of judicial work to which all claimants are entitled.

An outline of the history of this litigation is believed to be essential to a clear understanding of the issues herein. Anything beyond a mere outline would be extremely lengthy and perhaps unhelpful due to the narrow issues presented by Petitioners of: (1) whether new Federal statutory provisions on the exact subject apply to pending undecided lit-

igation; (2) whether original writs of mandamus and injunction were properly granted under the facts of this case as a substitute for untried actions and unheard appeals; and (3) whether decisions ordering pleadings dismissed for lack of jurisdiction (for failure to exhaust administrative remedies) are "res judicata" as to the merits of causes of action therein when said merits are presented in different form and substance under a claim of Federal jurisdiction on new grounds. Or stated differently, must the factual and legal basis of the new jurisdictional grounds be examined to test their substance or is it proper to summarily reject them without Court consideration as the Court of Appeals has done herein?

Respondents state the questions differently as (1) the application of the new statutory provisions and (2) whether writs were proper "where the District Court refused to comply with the mandate" and where Petitioners harassed respondents with new actions on issues allegedly already litigated.

Counsel for Judge Hall emphatically reject and deny Respondent's charge that he refused to carry out said mandate. This Brief will collect the facts which refute Respondents' charge.

III. Outline of Facts

On May 20, 1946 the Federal Home Loan Bank Administration named A. V. Ammann as Conservator of the Long Beach Federal Savings and Loan Association (hereinafter called Long Beach Association). That same date Mr. Ammann summarily took possession of all the properties and assets of that Association.[2] The alleged grounds assigned for the seizure were that the Association was conducting its affairs in an unlawful, unauthorized and unsafe manner, that its management was unfit and unsafe, and that it

[2] Order 5254, 14 F. R. D. 273, 284, footnote 6.

was jeopardizing the interests of its members, creditors, and the public.

Since this summary seizure, numerous actions have been brought denying the grounds specified, and challenging its validity, as well as the validity of the actions of the Conservator. All of these actions have been filed in the United States District Court for the Southern District of California. An action growing out of the same subject matter was brought in a California State Court by Respondents and removed to said District Court. Two petitions for writs of mandamus and injunction have been filed by Respondents in the United States Court of Appeals for the Ninth Circuit. One petition for a writ of mandamus was filed in this Court, also by Respondents.

On May 27, 1946 one Mallonee and others, as a shareholders' committee of the Long Beach Association, filed Action 5421 in the District Court challenging the validity of the Conservator's appointment and actions, and alleging that the seizure was motivated by ill will and malice. A temporary injunction was issued. Since constitutionality of a Federal statute was drawn in question, a three-judge Federal District Court was convened. That Court held certain provisions of the Home Owners' Loan Act unconstitutional, enjoined a proposed administrative hearing, and ordered the Conservator's removal and an accounting.[3] The order was stayed the day after its issuance by an order signed by Mr. Justice Rutledge of this Court.

The Three-Judge Court Decision was appealed to this Court. A petition was also filed for a writ of mandamus to set aside an order of the District Court allowing attorneys' fees and costs to the shareholders' committee and for a writ of prohibition and injunction against any further allowance.

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[3] *Mallonee* v. *Fahey*, 68 F. Supp. 418 (D. C. Cal. 1946).

This Court reversed the judgment of the Three-Judge Court, but did not order dismissal of Action No. 5421.[4] The Petition for the extraordinary writs was denied.[5]

On August 22, 1946, Action No. 5678 was filed by the Federal Home Loan Bank of Los Angeles and some of its stockholders' associations attacking the validity of various orders[6] of the Federal Home Loan Bank Administration dissolving the Los Angeles Bank, transferring its properties and assets to the Portland Bank, and changing the name of the latter to Federal Home Loan Bank of San Francisco.

Actions 5421 and 5678 were consolidated. Thereafter, numerous orders were made by the District Court, particularly in connection with interpleaders, by persons owing notes to the Long Beach Association secured by trust deeds. These interpleaders brought approximately a million and a half dollars ($1,500,000) into Court. Numerous orders were made thereon. There were also numerous other orders, including certain orders allowing attorneys' fees and costs. From several of such orders appeals were taken by the Respondents attacking the jurisdiction of the District Court but all of such appeals were dismissed.[7] Appeals were also taken from subsequent orders allowing attorneys' fees, Masters' fees, and the like, some of which are still pending.

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[4] *Fahey* v. *Mallonee*, 332 U. S. 245. In fact, in its opinion this Court said in part: at pp. 256-257, "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies." And at pages 257-258 this Court said: "Our decision is that it was error in the Court below to hold the section unconstitutional, to oust the conservator or to enjoin any of his proceedings or to enjoin the administrative hearing, and this without prejudice to any other administrative or judicial proceedings which may be warranted by law."

[5] *Ex parte Fahey*, 332 U. S. 258.

[6] 14 F. R. D. 273-283.

[7] See *Mallonee* v. *Fahey*, 117 F. Supp. 259.

On January 17, 1948, by Order No. 388 of the Home Loan Bank Board, the Conservator was removed, and the Long Beach Association was restored to possession of some of its property and assets.[8] The claims ordered dismissed by the Court of Appeals herein relate chiefly to what the Conservator did during his two-year tenure and what happened to this seized property and assets.

On December 1, 1949, an order[9] was made after hearing in the *Consolidated* case (5421-5678) enjoining and restraining an administrative hearing before the Home Loan Bank Board concerning the administration of the affairs of the Long Beach Association.[10] Neither the Order of the Home Loan Bank Board for the hearing, nor the injunction of December 1, 1949, were concerned directly with the subject matter of the Los Angeles Bank, Action No. 5678.

The Respondents appealed from the December 1, 1949, Order for Injunction. On April 2, 1952, the United States Court of Appeals rendered its decision reversing the order granting the injunction.[11]

Subsequently, petitions for certiorari were filed in this Court and denied.[12]

On June 19, 1950, after notice and hearing, Judge Hall issued an Order for allowance of attorneys' fees, limited to Counsel for plaintiffs in the Los Angeles Bank Action No. 5678. Respondents appealed.

On November 6, 1952 the United States Court of Appeals filed its opinion in the attorneys' fees appeal,[13] the concluding paragraph of which reads as follows:

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[8] On January 23, 1948 the District Court entered an order removing Ammann as Conservator, requiring him to account, and revesting title to all of its property and assets in the Long Beach Association. No appeal was taken from that order.

[9] 14 F. R. D. 273.

[10] Order No. 2015 (Sept. 9, 1949), 14 F. R. D. 273-283, footnote 11.

[11] *Home Loan Bank Board* v. *Mallonee*, 196 F. 2d 336.

[12] *Mallonee* v. *Fahey*, 345 U. S. 952; Reh. Den. 345 U. S. 978.

[13] *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420.

"For reasons set forth in this opinion the order of the lower court here on appeal which awards attorney's fees to appellees is reversed. The validity of the claim for such fees is sustainable only on the theory that the lower court had *jurisdiction in personam over indispensable parties* to the Los Angeles Action and jurisdiction of the subject matter of that action. We have previously held that the court did not have *such jurisdiction* and we therefore remand the case before us with directions to the lower court to dismiss the Los Angeles Action." (p. 481) (Italics supplied).

Applications for certiorari were made to this Court and denied.[14]

On May 25, 1953 a consolidated mandate of the Court of Appeals in the injunction and fee cases, *supra*, dated May 21, 1953, was presented to the District Court. No action was taken pending final disposition of the then pending petitions for rehearing of orders denying the certiorari petitions by this Court. Said petitions were denied June 8, 1953[15] and some days later this action was called to the attention of Judge Hall.

The matter of action upon the mandate came on for hearing before Judge Hall on June 22 and 24, 1953. Judge Hall advised the parties that he was then involved in the trial of a complicated water rights case at Fresno, California, which case required his presence in Fresno every day of the week except Mondays. He also advised Counsel that he must preside over the criminal calendar of the Court during July, August, and September—a full-time judicial duty in his Court. Judge Hall pointed out to Counsel that the mandate went much further than the two orders appealed from, i.e. the order of injunction and the order for attorneys' fees, in that it ordered:

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[14] *Mallonee* v. *Fahey*, 345 U. S. 952; Reh. Den. 345 U. S. 978.
[15] 345 U. S. 978.

1. Dismissal of Action 5678 at the cost of Plaintiffs.

2. Dismissal of specified pleadings—but not the entire action in Action 5421.

3. Return to the San Francisco Bank of certain promissory notes and collateral security.

4. Vacating the order of preliminary injunction.

He requested Counsel for Respondents herein, as Counsel for the prevailing parties, to prepare and submit whatever judgments and orders in their opinion were required to be made to carry out this Mandate.

One form of judgment and thirteen proposed orders were then submitted by the Respondents herein.

IV. Comparison of Mandate's Provisions and Judge Hall's Orders of Compliance

Provisions of Mandate	Compliance with Mandate
"1. Dismiss Civil Action No. 5678-P.H. at the cost of plaintiffs."	1. By Opinion filed November 30, 1953, (117 F. Supp. 259, pp. 272-273) the District Court stated that upon determination of the propriety, amount, and allocation of costs in accordance with the mandate an order would be made severing Action 5678 from Action 5421 and Action 5678 would be dismissed. Hearings on this phase of the matter were held in January 1954 and on July 23, 1954 judgment of dismissal with costs was rendered.

Provisions of Mandate	Compliance with Mandate
"2. Dismiss the following pleadings in Civil Action 5421-P.H.:	2. On December 11, 1953, in accordance with an Opinion deciding disputed points (117 F. Supp. 259, 275-276) an order was made providing in part as follows:
(a) The complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;	"Now, therefore, in compliance with the terms of paragraph 2(a), (b), (c), (d) and (e) of said mandate,
(b) The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party complainant and cross-claimant;	"It is hereby ordered that the following pleadings in civil action No. 5421-PH be, and the same are, hereby dismissed:
(c) The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant;	"The Complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;
(d) The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;	"The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto at the cost of third party complainant and cross-claimant;
(e) The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis,	"The cross-claim of Federal Home Loan Bank

Provisions of Mandate	Compliance with Mandate
at the cost of said cross-claimant."	of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant; "The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant; "The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant;"
"3. Dissolve, set aside and vacate the order of said District Court entered the 13th day of March, 1948, insofar as the same requires Federal Home Loan Bank of San Francisco to deposit in the Registry of said District Court promissory notes in the aggregate principal amount of $6,300,000.00, collateral securing the same and any other documents or property deposited by San Francisco Bank pursuant to said order; and return to Federal Home Loan Bank	3. On September 16, 1954 the District Court ordered: "That the said U. S. Government bonds in the face sum of $5,300,000 and their attached coupons, described in detail in the Order of December 11th, 1953, together with the sum of $994,865.01, plus 14 cents per day since August 3, 1953, and the conservator's notes in the face sum of $6,300,000, all now on deposit in the registry of this Court in Action No. 5421, be returned to the Federal Home Loan Bank of San

Provisions of Mandate	Compliance with Mandate
of San Francisco without charge or impairment said promissory notes, together with Government bonds in the face amount of $5,300,000.00 with all interest coupons attached thereto at the time of deposit and together with cash from the sum in the Registry of said Court sufficient to make the combined total sum of $6,324,098.35, with interest on $6,300,000.00 at 2% per annum from the 10th day of March, 1948 until the date of such release."	Francisco by transferring the same in the Registry of this Court to the within Action No. 13979, to the credit of said Federal Home Loan Bank of San Francisco and/or Long Beach Federal Savings and Loan Association, whichever shall be held entitled thereto by final judgment in the within action, which the Clerk is ordered forthwith to do. "It is further ordered, that upon compliance with the foregoing paragraph, the Long Beach Federal Savings and Loan Association, and in lieu and instead of said U. S. Government bonds of $5,300,000 and their attached coupons and said cash in the sum of $994,865.01, plus 14 cents per day since August 3, 1953, shall deposit in Court in this action U. S. Government, 2½% September 15, 1972-67 U. S. Government bonds in the face of $7,005,000 and their attached interest coupons, which shall be retained by the Clerk in the registry of the Court

Provisions of Mandate	Compliance with Mandate
	pending final adjudication of the within action, as collateral security only on said conservator's notes in the face amount of $6,300,000, subject to all claims and liens, rights if any, of the parties to the within action. and that upon such deposit of $7,005,000 of U. S. Government bonds and their attached coupons the Clerk shall forthwith deliver to Long Beach Federal Savings and Loan Association the said U. S. Government bonds in the sum of $5,300,000 with their said attached interest coupons and the sum of $994,865.01 plus 14 cents per day since August 3, 1953. "While no stay has been ordered in the pending writ proceedings in the Court of Appeals, nevertheless out of deference to such Court, and possible Supreme Court rulings thereon, or in connection therewith, execution of the within order is stayed until further order of the Court."
"4. Set aside and vacate	4. This Order was entered

Provisions of Mandate	Compliance with Mandate
said order of preliminary injunction entered the 2nd day of December, 1949."	by the District Court September 21, 1953.

We quote the text of the orders complying with parts 2 and 3 of the Mandate as they are the only orders which are disputed herein.

It is beyond dispute that when the Court of Appeals by paragraph 1 of its Mandate ordered Judge Hall to "Dismiss Civil Action No. 5678" and then by Part 2 thereof only ordered him to "dismiss the following pleadings [of the many in the printed record before it] in Civil Action No. 5421—P.H.:" that something different was intended in the handling of the two actions. Yet, the Court of Appeals now says its intent was the same as to both actions, i. e., complete dismissal. Surely the meaning of the plain words refutes such an intent. And even if this was the undisclosed intention of the Court of Appeals, that is no justification for the issuance of an extraordinary writ against the District Judge.

Judge Hall was of the view that the plain language of the mandate directing the Court, in paragraph 1, "to dismiss Civil Action 5678," and in paragraph 2 to "dismiss the following pleadings in Civil Action 5421," plainly indicated that Civil Action 5421 should not be dismissed but that only the specified pleadings should be dismissed.

In addition to this difference in language, Judge Hall was aware of the fact that the Court of Appeals knew that over 50 orders had been made in Action 5421 which had become final, the effect of which was to quiet title to real property of more than 480 separate parcels of land of homeowners who had borrowed money from Long Beach Association and secured the repayment thereof with deeds

of trust constituting clouds upon the title to said property.[17] In the Brief of Respondents herein (appellants therein) in Case No. 12511 in the Court of Appeals, at page 85, it was stated "It may be assumed that those orders insofar as they directed the issuance of reconveyances to the borrower-intervenors, were final."

Attention of the Court is also called to the excerpts from the Briefs of the Respondents in Cases No. 656 and 659 (Oct. term, 1953) referred to on page 30 of the Petition herein. There it is pointed out that Respondents expressly **conceded the reason for the difference between dismissing** Action 5678 completely and dismissing only certain pleadings in Action 5421.

The Court of Appeals now says that it intended that the entire Action 5421 should be dismissed. The District Court followed the language of the Mandate exactly. If he was wrong in so doing, the remedy was by appeal and not by mandamus.

The action of Judge Hall with respect to Part 3 of the Mandate is best summarized in his own opinion as follows:

> ". . . it would be repugnant to all ideas of justice and law, that the appellate court intended by mandate in one case, (5421-5678), to summarily decide the merits of another case, (13979), not before them on appeal, and no phase of which had been decided by the trial court so as to posture it for appeal, and thus to preclude any defense by Long Beach Association to action 13979. It is also repugnant to the express terms of the order of that court, which vacated the then existing injunction, and expressly permitted the San Francisco Bank to prosecute, and the Long Beach Association to appear in, answer, defend and participate in action 13979, 117 F. Supp. 259, at page 291." [18]

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[17] See discussion of Judge Hall, 117 F. Supp. 259 at 273-276.
[18] 122 F. Supp. 401; 444, 445.

Since neither party herein has made it crystal clear just how Respondent's Foreclosure Action 13979 fits into the complicated picture of this litigation some further explanation of that foreclosure case is required.

On March 25, 1952 the Court of Appeals entered an order authorizing Respondents to bring suit in a California State Court to foreclose upon the notes and collateral which by paragraph 3 of its disputed Mandate it one year later ordered returned to Respondents by the District Court. The order of March 25, 1952, further allowed Petitioners herein to appear in, answer, defend and participate in that action.

That case was then removed to Federal District Court, given the number of 13,979, and assigned to Judge Hall. On November 13, 1952 the Court of Appeals entered another order expressly providing "Said District Court is hereby permitted to entertain and determine the cause designated as No. 13,979 filed in said District Court."

On December 11, 1953 Judge Hall, pursuant to paragraph 3 of the Mandate, ordered the return of the collateral previously ordered deposited by the District Court in the registry of the District Court. That collateral included the identical collateral—which is the subject of the judicial foreclosure sought by Respondents in the *Foreclosure* Action No. 13979. This order required the San Francisco Bank to sign a receipt for the money and property, acknowledging that it was received and held by the Bank as collateral security only. The Bank refused to sign such a receipt. It is clear that the only claim of San Francisco Bank to the collateral was as collateral security. This is recognized by Mr. Justice Douglas in his Opinion herein, on October 31, 1955, denying a stay of the order granting mandamus in this case.

Before the date fixed for the return of the collateral, the Long Beach Association petitioned for and was granted

a stay of the order pending hearing on a motion made in the *Foreclosure* Action for the re-deposit of the collateral in that action. On September 16, 1954 the Court vacated the stay order.

The District Court was faced with two problems: (1) compliance with the provisions of paragraph 3 of the Mandate to return the notes and collateral to Respondents; (2) a motion made in the *Foreclosure Action* to retain the collateral in that case pending the outcome [18a] of that litigation. The District Court believed that the changed conditions and equitable considerations required it to order the collateral returned in Action 5421 as required by the Mandate and then held in the *Foreclosure Action* to await its outcome. The order to that effect was appealed from and was pending before the Court of Appeals, and jurisdiction over it presumably transferred to that Court while the mandamus petition was before it for action. The effect of the writ of mandamus is to compel the District Court to, in effect, vacate an order which had been appealed from and over which it has no jurisdiction.

A final summary judgment quieting title on some 4000 parcels of land was entered on September 16, 1954 [18b] in Respondents' *Foreclosure* Action and an appeal was taken from that Judgment.

Attention of the Court is called to the statements of the Court of Appeals in its Opinion (pp. 43-44) with respect to the *Foreclosure Action's* summary judgments, including all of the money on deposit in the Registry of the Court. It is stated that such summary Judgments "would contravene

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[18a] On power of District Court to transfer money from one action to another see e.g. *United States* v. *Morgan*, 307 U.S. 183, 197; *Clarke* v. *Chicago, B. & Q. R. Co.*, 91 F.2d 561, (C.A. 10, 1937); *Lord* v. *Superior Court*, 27 Cal.2d 855, 858; 168 P.2d 14, 16 (1946).

[18b] 122 F.Supp. 960. Respondents sought foreclosure of all liens on all property involved in notes and deeds of trust assigned to the San Francisco bank and the Court quieted titles of all who had paid.

the mandate of this Court" and that the judgment proposed to be entered in 13979 "would be a flagrant transgression of the mandate." The Opinion and findings of the District Court expressly excluded from the quiet title judgment the money, notes, trust deeds and collateral on deposit in the Registry of the Court.[19] It is perfectly obvious that the Court of Appeals entirely mis-read the opinion and judgment of the District Court and was wholly unjustified in stating that the Judgment contravened or transgressed the mandate.

When Respondent sought judicial foreclosure it made an election of remedies to proceed by way of judicial foreclosure of the right of redemption by a judicial sale under the direction of a court of competent jurisdiction. Having invoked the judicial power of the Court, the *res* of the foreclosure was subject to the jurisdiction of the Court. And the Court could preserve its jurisdiction by proper orders and prevent the ousting of the Court's jurisdiction by private sale of the pledged property.

As is stressed by the Petition (pp. 4-6) herein the notes in question expressly authorize secret foreclosure. Also as pointed out in the Petition (p. 10) Respondents have at all times, until they appeared before Mr. Justice Douglas herein, declined to give any assurances against a secret foreclosure of the notes if possession of the notes and collateral was given to them.

Faced thus with conflicting directions from the Court of Appeals, i. e., (1) the Mandate ordering return of the notes and collateral to Respondents, and (2) the order to determine Respondent's *Foreclosure Action*, Judge Hall entered the order quoted above which does both. *Howard* v. *McCullum*, 76 U. S. 175.

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[19] 122 F. Supp. 401, 420-421, 428-456.

Another equitable justification for Judge Hall's order on paragraph 3 of the Mandate is the fact that petitioners tendered a sum of money ($7,000,000) large enough to cover all possible claims of Respondents. To give Respondents the opportunity of making a secret foreclosure under these circumstances is clearly inequitable. The interest of 8,000 homeowners and 30,000 depositors are entitled to consideration.

Under these circumstances of *secret foreclosure* vs. *judicial foreclosure* the order entered was the only equitable action Judge Hall could take and the only action he could take which complied with *both* Court of Appeals orders. After all, Respondents themselves sought judicial foreclosure and should not be heard to complain that they are to receive what they asked for.

V. Judge Hall Did Not "Refuse" To Carry Out The Mandate as Charged by Respondents

The Petition for the writ of mandamus, and the decision of the Court of Appeals, is based upon what Judge Hall did, or did not do, for the period of approximately one year after the Mandate of the Court of Appeals was issued. Three times in their Brief of Opposition herein Respondents make the serious charge that Judge Hall "refused" to carry out the Mandate (pp. 2-3, 7, 9). The facts do not support Respondents' charge.

Appendix A to this Brief gives a detailed account of the work of Judge Hall during the year in question. That account demonstrates that in handling 1,400 other calendared matters besides the instant complicated litigation Judge Hall did a tremendous amount of judicial work. It is obvious from the facts there recited that long before the filing of the Petition for Mandamus on June 4, 1954, either Judge Hall had issued orders on all matters covered by the Mandate or they had been the subject of hearings and were under submission for decision. Far from arbitrarily, or

unreasonably, refusing to carry out the provisions of the Mandate, Judge Hall had given all possible time and priority to the parties with respect thereto.

The list in the Appendix A includes only the recorded action of Judge Hall. It cannot give an accurate or full report of the many hours of time devoted to this unique litigation in the study of briefs, pleadings and other papers, and in preparing the three exhaustive opinions filed herein.[20] A steady stream of pleadings and briefs have been filed in this vastly complicated litigation on hundreds of subjects. This steady stream reached the flood stage after August 2, 1954 when the Housing Act of 1954 [21] became effective. This is understandable because, as the Court of Appeals itself has stated, that Act is the "basic issue" (p. 36) and the issues raised with respect to that Act are issues never before decided on their merits.

After August 2, 1954 new actions were filed by Petitioners in the District Court [22] along with proposed amendments to pending pleadings, to bring all of this litigation under the Housing Act of 1954, which confers jurisdiction on Federal District Courts over the Home Loan Bank Board in "any matter under this section, or regulations made thereunder, or any other law or regulation." [23] All of said new and proposed pleadings rely upon the fact that said 1954 Act also provides:

> "Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling." [24]

This new Act seems to cast a special duty upon Judge Hall's District Court since it rests its newly created juris-

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[20] Cited, *supra*, footnote 1.
[21] 68 Stat. 590, 12 U.S.C. 1464, et seq. (1952 Ed., Supp. II).
[22] 17,133; 17,152; 17,153; 17,154.
[23] Cited, *supra*, note 21, § 503.
[24] 12 U.S.C. (1952 Ed., Supp. II) p. 231.

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refused by the Congress, is to the contrary.
National City Lines, 337 U.S. 78, 84.

hat upon this record of conscientious, care-
consideration of the rights of all parties in
litigation there is no showing that Judge
unreasonably delayed or failed in any way
the provisions of the Mandate. The claim
nts that Judge Hall disregarded the Man-

[25] See Petition herein pp. 16-18, 23-26.

date is clearly without basis in fact. The record herein proves that he attempted to comply with it and that he did so according to his understanding of the Mandate based upon the entire record in the proceedings.

VI. Issuance of the Extraordinary Writ of Mandamus Is Not Proper in This Case

It is believed that the outline of the work of Judge Hall in Appendix A is convincing evidence in and of itself that the use of extraordinary writ of mandamus is improper under the facts of this case. Granted that such extraordinary remedies are proper where the facts warrant, it is respectfully submitted that the action of the Court of Appeals in adopting a meat-ax approach to this complicated litigation is a drastic and unprecedented remedy which merely further confuses and confounds the fantastic record herein. And as will be demonstrated at pages 27-29 herein, the Court of Appeals decision creates a flood of, rather than ends, the litigation growing out of the seizure of the Long Beach Association.

In *Ex Parte Fahey*, 332 U.S. 258, this Court in denying a petition for a writ of mandamus in this litigation said in part (pp. 259-260):

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . . . they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only when appeal is a clearly inadequate remedy. We are unwilling to use them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes."

This is a case where the Court of Appeals has taken "drastic" action against Judge Hall in spite of his record

of giving an extraordinary amount of his time to this litigation, his strict compliance with the parts of the Mandate which are clear, his tremendous effort to consider what the parties presented on the disputed terms of the Mandate here in question, and his three carefully written opinions[26] which fully explain all of his actions. The two orders with which that Court disagrees could have been appealed upon a full record rather than considered upon the petition for extraordinary relief as was done herein.

There is no question but that this is an instance where appeals could have been heard just as expeditiously as the Petitions for extraordinary relief. Judge Hall would not be human if he did not want to terminate this litigation even more so than does the Court of Appeals. Obviously it plagues him constantly and takes a tremendous amount of his time. Obviously also, he believes, that each claim—no matter how groundless—is entitled to be judicially considered so every person may have his day in court. That this judicial approach requires much time in a complicated case such as this is no excuse for summarily denying claims without consideration of their factual and legal bases.

That the Mandate was clear as to the scope of dismissal intended in Action 5421 is beyond question. That the Court of Appeals now says it meant complete dismissal of that Action instead of dismissal of specified pleadings now clarifies its original statement. But it is beyond dispute that in its initial mandate that Court issued a flat dismissal Order in Action 5678, and merely ordered certain specified pleadings (of the many pleadings then in the 12,000 page printed record before it) dismissed in Action 5421. The only question here is whether the Court of Appeals' own lack of clarity justifies the issuance of the extraordinary writs

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[26] Cited, *supra*, note 1.

herein to correct what it says are mistakes by Judge Hall in interpreting what was said by that Court.

VII. Size of the Record and Complication of Issues Does Not Justify Wiping Out All Claims Herein, Thereby Destroying Accrued Rights of Unrepresented and Unnotified Third Parties and Requiring a New Round of Litigation to Settle Matters Decided by Prior Orders in Cases Now Ordered Dismissed.

The sweeping and unprecedented decision of the Court of Appeals makes this a decision of far reaching consequences not only for the current litigants but for third persons who are not now parties. Seemingly this unique action is based chiefly upon the fact that this litigation has grown to the point that the Court of Appeals in exasperation wrote in its opinion:

> "With new cases being rapidly filed in which all of the old issues of 1946 are revived and asserted to be now open (or reported) for adjudication, it is certain that the problems now present will multiply until they outrun the capacity of the courts to bring any sort of order out of the chaos and confusion thus being engendered. At the present time the bulk of the records makes it utterly impossible to adequately describe the scope of, and the demands voiced in pleadings in the many actions now in the files of this and the lower court. As a matter of fact it is almost impossible to locate certain motions, orders or pleadings in the vast array of records in this litigation. In truth and in fact it has absorbed unto itself the peculiar expanding characteristics of a Banyan tree. In argument of the petition, counsel for Respondent litigants frankly characterized it as 'already fantastic,' and we have pointed up in our opinions

that its unique and unprecedented pattern is without a counterpart in the books. No reported case or controversy has been called to our attention which even remotely resembles it. . . .

"It is our considered judgment that it would be impossible to find in the books a more unique, confusing and extraordinary pattern of litigation or one more shot through and through with 'exceptional circumstances.' Counsel for Respondent litigants was modestly restrained when he characterized the present record as 'fantastic.' The cold fact is that its astounding proliferations have finally created a record of overwhelming and unmanageable size.[27]

Far from justifying the drastic action herein it is respectfully submitted that this situation requires a respecting of the appellate procedures set forth in the United States Code. Then each appeal on each issue, or on each claim, can receive the consideration it deserves. The fact that claims are complicated does not justify summary rejection without consideration of the facts alleged in the complaints.

Here the Court of Appeals granted in part and denied in part the relief requested by the Respondents, obviously basing its views upon its shocked reaction to the unique situation in this case. The relief granted is a flat holding that Petitioners, who have for ten years tried to secure a judgment on the merits of their claims, may never have that judgment. The Court of Appeals holds that its decisions based upon the technicality of failure to exhaust administrative remedies bars Petitioners forever from asserting their claims growing out of Respondents' seizure of their property and assets. Such denial of a judicial hearing upon

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[27] *Federal Home Loan Bank of San Francisco, et al.* v. *Honorable Peirson M. Hall et al.*, Opinion No. 14,378 (C.A. 9, 1955), p. 30-31, f.n. 8.

a governmental seizure does not square with due process of law.[28]

While not ordering the *Foreclosure* action dismissed (or remanded to State Court), defense of that case is an exercise in futility if Petitioners are precluded from asserting the defenses or claims prohibited by the Court of Appeals. In effect Respondents are allowed to maintain *Foreclosure* Action 13,979, but Petitioners are prohibited from defending against Respondents claims therein. Surely such a situation is unique in judicial annals.

Obviously, the Court of Appeals has sought to wipe out this litigation completely. As laudable as that objective may be, it is submitted that this summary wiping out of the hundreds of orders made in this litigation, by a dismissal of Actions 5678 and 5421, will bring an unprecedented flood of litigation far exceeding that herein to date. The helpless and innocent bystanders—home owners and home buyers of approximately 480 parcels of land who had executed trust deeds as security for loans [29] and were so unfortunate as to be affected by this litigation, who intervened in Action 5421, and who have paid $1,820,870.31 [30] into Court—will be grievously affected. The Court of Appeals ordered Action 5421 dismissed within ten days and this the District

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[28] While this Court has held, in connection with the governmental seizures, that those whose property is seized may be compelled to await later judicial proceedings upon the legality of such seizure where "only property rights are concerned" it also has held there must be at "some stage an opportunity for a hearing and a judicial determination." *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599.

[29] See 117 F. Supp. 259 at 274-276.

[30] *Ibid.* p. 288 places the amount then at $1,641,040.46. There is also some $5,000,000 which was paid directly to the Long Beach Association by home owners upon deeds of trust in reliance upon the orders quieting title in Action 5421. The Court of Appeals order wiping that Action out completely clouds the titles of these home owners. See Appx. II to "Return of Real Parties in Interest" in the Court of Appeals for a list of the amount of each such deed of trust and its then status.

Court so ordered. By carrying out the Court of Appeals directions herein in Action 5421 Judge Hall vacated final orders affecting the legal rights and property of these persons who are not now parties to the current proceedings, without notice to such persons, thereby presenting a serious question of whether such persons have been accorded due process of law. Part of the $1,820,870.31 was ordered returned to Respondents herein by the Court of Appeals, i. e., $994,813.44.[31] This money consists of money paid by home owner borrowers, principal and interest, penalties and impounds, reconveyance fees and Federal Housing Administration bonuses. Presumably these home owners must now seek some other legal means to repay their notes, mortgages and other claims all over again and clear the titles to their homes. What they thought was clear title under orders in Action No. 5421 is wiped out.

It seems reasonable that these affected persons must be notified of what has happened so they can take appropriate legal action to protect themselves. But who is to notify them and how? It is submitted that before Action 5421 was completely wiped out, the District Court should have been permitted to notify these affected persons. The task of unwinding this effect of the drastic action of the Court of Appeals is a most serious and difficult matter.

Surely, the substitution of this extraordindary and drastic remedy for the simple appeals from the two District Court orders with which the Court of Appeals disagrees is a cure much worse than the evil the Court of Appeals seeks to eliminate. If the Court of Appeals writs and the District Court orders based thereon could be amended to allow unappealed or final orders and judgments to stand, this

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[31] See p. 65 of Court of Appeals opinion cited, *supra*, note 27 setting forth the receipt Respondents must sign.

would solve a part of this problem insofar as third persons are concerned.

VIII. The District Court Had a Judicial Duty to Perform And Is Not Subject to Mandamus for Performing It.

The Respondents seem to have believed that upon their offering of the Mandate for filing, Judge Hall should have dropped all his other work and immediately signed the order they proposed. Surely such is not the required mode of judicial action in our Country. This Court so stated long ago when mandamus was sought against the Court of Claims to compel such speedy unjudicial action. See *In re Hall*, 167 U. S. 38 at 42, where the Court said:

> "In this case the judgment was, in form at least, absolutely reversed and the case remanded to the Court of Claims for further proceedings not inconsistent with the opinion of this court. Confessedly, further proceedings by virtue of the mandate and under the direction of the Court of Claims were necessary to be taken before any judgment could be entered in such court and thereafter enforced, and *before any proceedings were taken by way of entry of any judgment Congress interfered by repealing the statute.*[32] When the mandate was filed in the Court of Claims and the motion made for judgment, that court was engaged in the regular trial of causes; it was not a motion day according to the practice of the court, and the court received the mandate and heard the request, and took the same under advisement for decision thereafter. The court was not bound, upon the simple presentation of the mandate and the statement of counsel, even if there

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[32] *Cf.* here, repeal of pre-existing law by adoption of the Housing Act of 1954. See, *supra*, note 21.

> were no opposition on the part of the attorney for the District of Columbia, to immediately drop all other business and grant the motion; it had the right, and it was its duty in the due and orderly progress of its work, to take the motion into consideration if it thought it necessary, so that it might examine the opinion and come to an intelligent conclusion as to what action was required of it for the purpose of complying with the terms of the mandate." (Italics supplied.)

In the instant case Judge Hall performed his duty in "due and orderly progress" of his work, took the matter of the mandate and its undisputed and disputed provisions into consideration and came to an intelligent conclusion as to the action required to comply with its terms. The record above recited makes this crystal clear.

And having so worded its Mandate as to create disputes as to its meaning, the Court of Appeals thereby cast a duty upon the District Court which that Court is not to be criticized for performing. In *Ex Parte The Union Steamboat Company*, 178 U. S. 317 at 319 the Court said:

> "The inferior court is justified in considering and deciding any question left open by the Mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court. . . ."

The Court there rejected the use of a writ of mandamus as a substitute for an appeal.

IX. Conclusion

The facts and the law applicable thereto demonstrate that the issuance of an extraordinary writ of Mandamus is unjustified in this Case. The Petition for a writ of Certiorari should be granted.

Respectfully submitted

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February 15, 1956

APPENDIX A

Work of Judge Hall for Year Following Receipt of Mandate

Since the Petition for the Writ of Mandamus and the decision of the Court of Appeals herein rests upon what Judge Hall did, or did not do, for approximately one year following receipt of this mandate, it is believed that an accounting of Judge Hall's work during that period is required. The records of Judge Hall's Court for the period of approximately one year after the issuance of the disputed mandate show as follows:

A. *In other cases:*

1. He heard more than 1,400 separate calendared matters, including both criminal and civil trials.

2. He presided in May and June, 1953, over the trial of a water rights case in Fresno, California.[1]

3. He was presiding Judge of the criminal calendar of his Court in July, August and September, 1953, and again in January, February and March, 1954—a duty which takes all the time of the Judge on this assignment. Criminal matters are required to be given a preference over all other matters,[2] such as the instant case.

B. *In the instant case:*

1. On June 22, 24, 1953, he held hearings on the requirements of the Mandate and on June 24 ordered the Mandate spread upon the records of the Court.

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[1] See 117 F. Supp. 266-268, for the fact that this water rights case was entitled to precedence over the instant litigation.

[2] Rule 50, *Federal Rules of Criminal Procedure.*

2. He directed Respondents to file by July 17, 1953, proposed orders to carry out the Mandate.

3. He directed oppositions and counter-proposals to be filed by August 3, 1953.

4. On September 21, 1953, he entered an order vacating the preliminary injunction pursuant to paragraph 4 of the Mandate.

5. On October 12, 1953—the earliest possible date—he began eight court days of hearings upon the twenty-nine motions and proposed orders relating to the Mandate, and a related foreclosure suit, Action No. 13979[3] —which had been filed by Respondents in State Court to collect on notes, signed by Conservator Ammann for the Long Beach Association, and to foreclose on claimed security therefor.

6. He requested the parties to make the audit required to carry out part 3 of the Mandate for the return of notes, bonds and cash to Respondents.

7. He prepared a memorandum opinion upon the points raised upon said motions and proposed orders so as to conform to said Mandate. To do this, Judge Hall had to study the pleadings, which are lengthy and complex (one of them covers 250 pages not counting exhibits), the opinions of the Court of Appeals which cover 118 printed pages, the record on appeal in Action 5421 of 12,000 printed pages, the records of the District Court which occupy several filing cabinets of four

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[3] On November 13, 1952, in staying all proceedings in consolidated cases 5421-5678 pending appeals from orders therein, the Court of Appeals had stated it was not staying proceedings in this case saying: "said District Court is hereby permitted to entertain and determine the cause designated as No. 13,979 filed in said District Court." By an order dated March 25, 1952 the Court of Appeals had authorized the filing of this Action and stayed its injunction insofar as it enjoined the Long Beach association "from appearing in, answering, defending and participating in such actions."

drawers each, and the hundreds of orders which have been made covering numerous parties and subjects besides the main litigants, all of which had to be examined due to the Mandate's language specifying what was to be dismissed and what was to be done.

8. On November 30, 1953 he filed a comprehensive memorandum opinion[4] covering all matters involved in the motions and proposed orders, except the amount and allocation of costs and the Special Masters' fees upon which further hearings were ordered held.

9. On December 11, 1953, orders were filed dismissing the pleadings in Action 5421 which had been specifically enumerated for dismissal in the Mandate.

10. On December 11, 1953, he entered an order for the return to Respondents, on December 22, 1953, of the notes and collateral specified in paragraph 3 of the Mandate.[4a]

11. On December 21, 1953, he ordered a stay of such order for return of the notes and collateral.

12. On January 14, 1954, he held hearings on motions in the foreclosure suit (Action 13,979) and motions for substitution of parties defendant.

13. On January 22, 1954, he signed an order substituting as parties defendant certain present and former members of the Home Loan Bank Board.

14. On January 27 and 28, 1954—the earliest possible date—he held hearings on the amount and allocation of the Special Master's fees. Said Special Master had during inspection and discovery proceedings in the consolidated cases 5421-5678 marked 44,000 documents, expended $10,000 for clerical help, court reporters, photostating, microfilming and the like, and had been

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[4] 117 F. Supp. 259. See Text pp. 34-98, Appendix A to combined Certiorari Petition of *Mallonee* et al. herein.

[4a] c.f. pages 12-15, compliance with mandate.

allowed $61,000 as interim fees. The Mandate's requirement of dismissal of Action 5678 at the costs of plaintiffs required a separation and allocation of these Special Master costs [5] from costs incurred and allocated to Action 5421 which the Court of Appeals had not ordered dismissed.

15. On June 10, 1954, he filed an opinion deciding all matters respecting costs and Special Master fees and allowances.[6]

16. On September 16, 1954, he filed an opinion [7] on return of the notes and collateral and granting summary judgment to quiet titles in foreclosure Action 13,979.

17. On July 22, 1954, he entered a judgment dismissing Action 5678 and fixed costs therein at $15,675.87 —after first severing the consolidated Actions 5421 and 5678.

18. On July 23, 1954, he entered judgment in accordance with paragraph 2 of the Mandate for costs against the Long Beach Association for $95,608.31 in accordance with findings of fact and conclusions of law made in that Action, and stayed execution of such judgment until further order of the Court.

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[5] Rule 53(a) of the *Federal Rules of Civil Procedure* requires that the costs be assessed before Action 5678 was dismissed.

[6] 122 F. Supp. 401. The Respondents herein knew, as their Petition of June 4, 1954 shows, that Judge Hall had this matter under consideration and was preparing this opinion.

[7] 122 F. Supp. 960. Similarly, as stated, *ibid*, Respondents knew this opinion was being written when they filed their Petition on June 4, 1954.